

05621

1 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
2 IN AND FOR KING COUNTY
3 _____
STATE OF WASHINGTON,) No. 96-2-15056
SEA
4)
Plaintiff,)
5)
vs.)
6)
AMERICAN TOBACCO CO.; BROWN &)
7 WILLIAMSON TOBACCO CORP.;
LIGGETT)
& MYERS, INC.; LORILLARD
TOBACCO)
8 CO., INC.; PHILIP MORRIS,
INC.;)
R.J. REYNOLDS TOBACCO
CO.; B.A.T.)
9 INDUSTRIES, P.L.C.; HILL
&)
KNOWLTON, INC.; THE
COUNCIL FOR)
10 TOBACCO RESEARCH-U.S.A.,
INC.;)
TOBACCO INSTITUTE, INC.;
foreign)
11 corporations; and unknown
corpor-)
corporations; and JOHN
DOE 1 - 100,) 12 and JANE
DOE 1 - 100, individuals,)
13 Defendants.)

_____) 14
TRANSCRIPT OF
PROCEEDINGS

15
taken before the HONORABLE
GEORGE A. FINKLE, Judge, 16
at the King County Courthouse,
Seattle, Washington, 17
beginning at 9:05 a.m.,
Thursday, November 12, 1998. 18
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20
21
22 REPORTED BY: Barry Fanning,
RPR

James D.
Lavielle, RPR
23 Official Court
Reporter
State of
Washington

24
25
05622

1
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05624

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1

I N D E X

2 Witness Name D C
RD RC

3 Lawrence Meyer 5626
5821 5854

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5

E X H I B I T S

6

7 Exhibit No. Marked
Admitted

8 No exhibits marked/admitted
9

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1 Seattle, Washington,
11/12/98, 9:05 a.m.

2 THE COURT: Please sit
down.

3 CROSS-EXAMINATION (Cont.)

4 BY MR. WEBB:

5 Q Mr. Meyer, I'll pick up where we
left off at

6 the time of our Tuesday recess at the end
of the day.

7 I actually had written -- I was asking
questions about

8 what the actual patent technology was of
the XA

9 cigarette and whether or not in fact it was
a safer

10 cigarette. We were starting to get into
that subject

11 matter and I had -- we were just
explaining to the

12 jury I think at the time of recess we had
shown them

13 the patent, remember, the patent that
Liggett got on

14 this technology set forth that it was
patented as a

15 unique technology that used a combination
of palladium

16 and nitrates to lower what is known as PAH
or PCAH

17 levels in cigarette smoke.

18 Is that correct?

19 A Yes.

20 Q And I wrote this out because --
and I think

21 you agreed with me that in some of the
Liggett

22 documents these are known as polycyclic
aromatic

23 hydrocarbons, sometimes PAH, sometimes the
patent uses

24 the term PCAH, is that correct?

25 A That is my understanding.
05627

1 Q Your understanding is those are
the same

2 things?

3 A Yes.

4 Q The materials that were put
together that

5 were going to be given to the Federal Trade
Commission

6 that -- remember you told us last week that
you

7 received a group of materials that were
going to be

8 submitted to the Federal Trade Commission
by you in

9 order to educate the Federal Trade
Commission on what

10 this XA technology was about, is that
correct?

11 A Yes.

12 Q This was marked as Exhibit 6461.
Let me get

13 you a copy of it and I'll show the jury.
This was
14 marked by Mr. Ferguson 6461, I have a copy
here that I
15 have to find things pretty easily. I'll
hand you
16 6461.
17 Am I correct that your
recollection is that
18 when that material was put together to
eventually go
19 to the members of the -- commissioners of
the Federal
20 Trade Commission, that material set forth
that the
21 technology that was invented and that this
XA
22 cigarette represented was the reduction of
PAHs in the
23 cigarette smoke, is that correct?
24 A Yes.
25 Q Let's show the jury an example of
that. Turn
05628
1 to tab 2E in 6461, this book that was put
together to
2 go to the FTC, this is tab 2E -- back up
here a little
3 bit -- this actually is a scientific paper
that was
4 included in the material -- strike that, I
don't want
5 to call this a scientific paper.
6 This was a document prepared by
the Arthur D.
7 Little Company, is that correct?
8 A I think with some input from the
research
9 fellows at Liggett, but I believe that's
correct.
10 Q This was -- it appears that this
was a
11 combination of a -- put together by Liggett
as well as
12 people at Arthur D. Little, is that
correct?
13 A Yes.
14 Q Arthur D. Little is a research
company that
15 was working with Liggett in developing the
XA
16 technology, is that correct?
17 A Yes.
18 Q And if we look at the -- and this
is in the
19 book that was going to go to the Federal
Trade
20 Commission?
21 A Yes.
22 Q If we look at this, this is an
abstract which
23 summarizes -- I'll not go through this
whole thing --

24 but this abstract right on the first page
of the

25 document that was going to the Federal
Trade
05629

1 Commission says the carcinogenicity of
cigarette smoke

2 condensate, CSC, toward mouse skin has been
3 dramatically reduced by 77 to 100 percent
through a

4 combination of palladium metal catalyst
with blends

5 high in Burley tobacco content or with
lower Burley

6 tobacco blends supplemented by the
addition of

7 compensating amounts of a nitrate salt.

8 This lowering of carcinogenicity
is

9 associated with decreases in the level of
polycyclic

10 aromatic hydrocarbons, PAHs, in smoke
condensate.

11 See that?

12 A Yes.

13 Q What that clearly sets forth is
this XA

14 technology lowered tumors in mice and
that resulted

15 because of these lower PAHs?

16 A Yes.

17 Q This issue of whether or not this
product in

18 fact actually lowered PAH, I'll ask this -
- strike

19 that question.

20 Your goal in giving this document
to the

21 Federal Trade Commission, this compendium -
- strike

22 the question.

23 What we're calling 6461 is
actually a group

24 of many different documents pulled together
to give

25 the FTC a good overview of what this
technology was

05630

1 all about.

2 Is that fair to say?

3 A Yes.

4 Q This is not really one document,
this is a

5 number of documents that were pulled
together into one

6 big document that you could hand to the
FTC, is that

7 correct?

8 A Yes.

9 Q Now in fact you told us you had at
one time

10 maybe 15 or 20 copies of this document?

11 A At least.

12 Q So the jury understands -- let me ask this
13 question.
14 Your goal as the lawyer for Liggett was to
15 eventually convince the Federal Trade Commission to
16 let Liggett market this product, is that correct?
17 A Yes.
18 Q And you believed, I take it, that everything
19 set forth in this material, in this book, 6461, that
20 was given to you by Liggett, you believed it was
21 accurate and correct, did you not?
22 A Yes, and on both sides of the issue to some
23 extent.
24 Q You did not believe there was anything in
25 here that was misleading, did you?
05631
1 A My belief was that this was a fair starting
2 point for the dialogue between the commission, the
3 company, and those who would be called in to comment
4 by the commission.
5 Q I take it as a lawyer for Liggett you at
6 least did not believe there was anything misleading in
7 this document?
8 A At the time, I certainly didn't.
9 Q In fairness, I want to make sure this is
10 clear. These materials were actually pulled together
11 for you by representatives of your client, is that
12 correct?
13 A Yes.
14 Q Show the jury that so that it's clear that
15 you didn't actually go out and gather the materials,
16 because you were not a scientist or expert on the
17 underlying technology.
18 Is that fair to say?
19 A Yes.
20 Q Lawyers who represent clients accept
21 information that our clients give us, is that correct?
22 A Most of the time.
23 Q To the extent we can check it out, we try
24 to do so but in this case you had -- strike that.

25 Am I correct you accepted the materials given

05632

1 to you by your client that were put into this book to

2 give to the Federal Trade Commission, you accepted

3 that as a fair and accurate representation of the

4 technology of this product, is that correct?

5 A Yes.

6 Q And the first page says here that it was

7 prepared and edited for you by Dr. J. D. Mold, Dr. H.

8 G. Bryant and J. D. Roth, Junior, Esquire.

9 Right?

10 A Right.

11 Q Mr. Roth was a patent lawyer at Liggett,

12 right?

13 A Right.

14 Q He was someone knowledgeable about the

15 product, XA technology?

16 A Yes.

17 Q Much more than you were?

18 A Yes.

19 Q Mr. Mold, you said, was head of the research

20 and development department at Liggett?

21 A That is -- my recollection is that he was the

22 number one guy in that research and development group.

23 Q You were aware Dr. Mold was heavily involved

24 in the development of the XA product, is that correct?

25 A That was my understanding.

05633

1 Q Who is Dr. H. G. Bryant?

2 A I didn't know him well, he was Butch Bryant

3 to me. He worked for Dr. Mold.

4 Q Although you did not -- well, once this was

5 given to you, you were the one that was going to take

6 it to the FTC and use it as a lawyer to convince the

7 FTC that they should eventually approve marketing this

8 product to the public in the United States?

9 A That was certainly the goal.

10 What I was going to do with it, and want to

11 emphasize this, I was going to start the dialogue.

12 hopefully I said Tuesday, I guess I've been consistent in

13 this, this is how we would start the dialogue.

14 When you say convince, I want to be
fair, I'm
15 not sure that this document would have
convinced them
16 but it would have started the dialogue.
17 Q Would it -- well, this document,
which is
18 what, three inches thick, quite a bit of
the material
19 you were hopeful this would begin the
process to
20 ultimately lead to your success in
convincing the
21 commission to allow this product to be
marketed in the
22 United States.
23 Is that fair to say?
24 A Yes.
25 Q Now in fact -- well,
approximately when did
05634
1 this document, in the form we have it
here in the
2 courtroom now, when did you actually
have this
3 document to take to the FTC, if you wanted
to?
4 A I think we talked about fall, I
think it was
5 fall of '78.
6 Q I think that's what you told me
last week.
7 There is no date on the document, is that
correct?
8 A For some reason there was a
cover letter, I
9 don't know whether the cover letter came
with it or
10 not, struck me it was October 1978 cover
letter.
11 Q And at that time your job you had
been
12 retained or requested by your client
Liggett to begin
13 to have informal contact with certain
representatives
14 of the Federal Trade Commission that you
had knowledge
15 about or relationships with, is that
correct?
16 A Yes.
17 Q And as a matter of fact, am I
correct that in
18 the fall of 1978, moving toward throughout
the fall
19 and into the end of year of 1978, you were
actually
20 having, I think what you called -- you told
Mr.
21 Ferguson were informal contacts with people
at the
22 Federal Trade Commission that you knew, is
that

23 correct?

24 A Yes.

25 Q And you were trying to get them
excited or
05635

1 interested in this technology, is that
correct?

2 A I wanted to prime the pump, as
they say, I

3 wanted them looking for me to come back
with something

4 that would be of interest. That was the
nature of

5 those discussions.

6 Q During that time period when you
were having

7 these informal contacts with the Federal
Trade

8 Commission, do you recall some occasions
when Mr.

9 Greer, the general counsel of Liggett, the
person you

10 told us became your friend, when Mr. Greer
would

11 periodically tell you that there were
actually

12 scientists inside the company that had been
working on

13 this XA project that were now raising real
issues as

14 to whether or not some of the things that
Liggett

15 wanted to claim about this product as being
unique in

16 fact were not unique?

17 MR. FERGUSON: Objection,
foundation.

18 THE COURT: Overruled.

19 THE WITNESS: Yes.

20 BY MR. WEBB:

21 Q And when Mr. Greer told you that
there now

22 were some scientists inside the company
that were

23 questioning whether or not this product
was really

24 what it was patented to be, did he tell you
that what

25 the scientists were raising is a concern
that in fact

05636

1 this product, as it turned out, did not
even reduce

2 the PAHs any lower than other cigarettes
already being

3 sold in the marketplace in the United
States?

4 A I recall one scientists of that
view, there

5 may have been more, but certainly I recall
at the time

6 that and Mr. Greer seized on this because
Mr. Greer

7 was looking for, if you will, the negative
as well as

8 the positive, certainly someone, I can't
remember

9 whether it was Vello Norman or Bryant, but
one of them

10 were -- had become fearful that your
premises, that in

11 fact the cigarette didn't reduce PCHs any
more than

12 other cigarettes was a problem.

13 Q Am I correct, now we're here today
in 1998,

14 obviously 20 years later, right?

15 A Almost perfectly.

16 Q 20 years later in this courtroom
you have

17 recently, just recently seen a document
that you had

18 not seen back at the time period, written
by a

19 scientist in Liggett that clearly sets
forth this

20 concern that the PAHs in this product
were not what

21 they were cracked up to be.

22 In other words, they were not
lowering the

23 PAHs any lower than other filtered
cigarettes already

24 in the marketplace, is that correct?

25 A I recall during my deposition
seeing that,

05637

1 I'll accept your premise, I don't
remember it as

2 precisely as you phrased the question.
I wouldn't

3 want to be misleading, but I agree that
that is a

4 document that I looked at during my
deposition.

5 Q Show the jury what we're talking
about. If I

6 ask you something you are not sure of, tell
me and

7 I'll make sure I try to show you to
document.

8 I'll hand to you what is in
evidence, a

9 document I think you were talking -- you
were shown in

10 your recent -- you were -- so the jury

11 understands, you just gave recent
deposition testimony

12 under oath before the trial started in
September of

13 this year, 1998, is that correct?

14 A Yes.

15 Q Am I right, September 8, 9, 10,
first part of

16 September?

17 A Right after Labor Day.

18 Q You were shown documents in your
deposition
19 that had been produced in this litigation
by your
20 client Liggett, is that correct?
21 A In part, yes.
22 Q Let me show you what I've marked
as State's
23 Exhibit 6052 in evidence, and I'll show the
jury the
24 document that I think both you and I are
talking about
25 that deals with this problem with the PAHs.
05638

1 MR. FERGUSON: I'm not certain
this has been
2 admitted. I'll object until we can check
that.

3 MR. WEBB: Let Mr. Ferguson check
that.

4 THE COURT: We show it as
admitted.

5 MR. FERGUSON: Not on my copy of
the order.

6 THE COURT: On October 12, I
think.

7 BY MR. WEBB:

8 Q I'm showing just the jury this is
a document

9 that, so the jury understands, has a number
which we

10 call the Bates stamp numbers.

11 Do you know what that is?

12 A Yes.

13 Q LG means this was produced in this
litigation

14 by Liggett, does not surprise you, does it?

15 A Looks like Liggett group.

16 Q Common practice when companies
produce

17 documents in litigation they stamp the
pages so we

18 show what company they came from, right?

19 A Right.

20 Q And this document, if we look at
it we can

21 tell this document, the beginning of it
is talking

22 about -- the first page of this document
is talking

23 about presenting a paper at the 12th
International

24 Cancer Congress.

25 See that?

05639

1 A Yes.

2 Q And in fact actually Liggett did
present a

3 paper on the XA technology to the 12th
International

4 Cancer Congress and it was included in the
materials,

5 this Exhibit 6461, that was going to be

given to the
6 FTC, is that correct?
7 A Right.
8 Q This document is talking about
presenting
9 a paper at that conference, talking about
also
10 publishing papers in preventative
medicine.
11 See that?
12 A Yes.
13 Q Is that another scientific
publication?
14 A Yes.
15 Q It's talking about press
coverage, popular
16 articles, discussing questions of PCAHs
and mouse
17 tin -- I think that is a typo -- results,
interviews,
18 talk shows, discuss inventions,
advertising copy, no
19 claims in advertising with respect to PCAH
or mouse
20 skin painting except in the form of
disclosure, i.e.,
21 see what it sets forth there?
22 A Yes.
23 Q I'm not interested in the first
page, this is
24 clearly a document related to the XA
project.
25 Fair to say?
05640
1 A No question.
2 Q If we go into this document, try
to show the
3 jury who prepared this document if we can.
Am I
4 correct that you, while you were doing work
for -- I'm
5 going to focus you on these initials at the
bottom, go
6 to the page Bates stamped last three
numbers are 791.
7 Are you with me?
8 A Yes.
9 Q Am I correct that while you were
working on
10 the XA project there was a scientist by the
name of
11 Dr. Andy I believe his name is spelled K A
L L I A M O
12 S, pronouncing that Kalliamos.
13 Does that name ring a bell?
14 A It doesn't, but that's 20 years
ago. I may
15 have known of him, it really does not ring
a bell.
16 MR. FERGUSON: I think it's N O S.
17 MR. WEBB: K A L L I N O S?
18 MR. FERGUSON: Yes.
19 MR. WEBB: I stand corrected.

20 THE WITNESS: With that correction,
it
21 doesn't ring a bell.
22 BY MR. WEBB:
23 Q Look at the initials there, maybe.
Does it
24 appear to you, as you look do you have a --
look at
25 the copy you have there, look down at those
initials.

05641

1 Does it appear to you that that
appears to be
2 the initials AGK, if you can tell?
3 A I would have said ATK, it's either
AG or ATK.
4 Q Show you another page of the
document. Go in
5 a few more pages.
6 A Next page, same initials.
7 Q Next page has the same initials?
8 A Same initials.
9 Q Same initials, then there's a page
at the top
10 where if you look really carefully, does it
look like
11 that appears to be Mr. Kallianos's last
name?

12 Can you make that out?
13 A If we accept the premises that he
worked
14 there and that's how you spell his name,
that would
15 not be an unfair interpolation of that
scribble.
16 Q We know this document is a
Liggett document,
17 appears to be prepared by some Liggett
scientist.
18 Fair to say?
19 A Certainly appears to be the case.
20 Q Look at this page here that I've
put on the
21 screen. See what this Liggett scientist,
whoever it
22 is, says about this PAH issue?
23 This page says, it is my feeling
that we
24 should publish only one paper in the J of
Preventative
25 Medicine at this time. That paper should
deal with

05642

1 the reduction of tumorigenic activity of
cigarette
2 smoke. This in essence is the message of
the second
3 paper which, with only minor
modifications, would
4 serve the purpose admirably.
5 This is the part I want to call
to your
6 attention.

7 In publishing the first paper,
the scientist
8 says, we can get ourselves in a box
firstly by
9 emphasizing PAH reductions. We are
obligated to show
10 that, one, PAHs are important and
responsible for
11 biological activity, two, that substituted
are more
12 important, and three, that we reduce the
level by only
13 about 50 percent for a particular blend,
but the
14 absolute level of PAH for treated product
is no
15 different than commercial filter
cigarettes.
16 I want to stop there and ask about
that
17 sentence.
18 When this Liggett scientist talks
about the
19 level of PAH per treated product, that's
referring to
20 the XA product treated with the nitrate and
palladium,
21 is that correct?
22 A Yes.
23 Q And so this scientist at Liggett
is saying
24 right here very clearly that the level of
PAH for the
25 palladium XA cigarette is no different than
commercial
05643
1 filter cigarettes?
2 A That's right.
3 Q Now, that's my X, by the way, I
put that X on
4 there because of this document.
5 I want to ask you whether -- am I
correct
6 that while you were working on this project
and
7 planning to go to the FTC, am I correct
that nobody at
8 Liggett ever told you that the levels of
PAHs for the
9 palladium cigarette were no different than
the level
10 of PAHs in commercial cigarettes already on
the
11 market?
12 A I have to answer that question
this way, if I
13 might. The reason why, when I gave you the
ad that
14 had been approved, that I'd approved, that
Don Cohn
15 had approved, you will recall that the
language that I
16 had in that ad had nothing to do with PAHs

or PCAHs,
17 because at some point obviously there was
an issue
18 raised not that different than what is
being expressed
19 here, but not quite that flatly, if I
recall, and
20 quite frankly, I was always of the view
that we
21 couldn't raise that kind of issue properly
anyway in
22 advertisements for this product. The only
thing we
23 could come close to possibly were some of
the results
24 that even this scientist recommended we
stick with,
25 that is the reduction of tumors, so there
was a
05644

1 dialogue about this kind of issue.
2 One of the things that I tried to
make clear
3 was what we had hoped would come from this
was a
4 better understanding of this patented
process and what
5 worked and what didn't.
6 The hard thing for anyone to deny
was the
7 reduction in tumors. It's fair to say what
I recall
8 most vividly, even though they talk about
it being the
9 PAHs or PCAHs, nobody knew what was going
on. Even
10 Kensler admitted to me he didn't know
what was going
11 on.

12 Q Am I correct that based on your
discussions
13 with the Liggett scientists and
representatives, as
14 you were getting prepared to go meet with
the FTC, and
15 as you were having your informal dialogue
with some of
16 the members, am I correct it was your
understanding
17 that the cigarette did exactly what the
patent said,
18 that it lowered the XA -- that the XA
cigarette
19 lowered the PAHs significantly lower than
commercial
20 cigarettes.
21 Was that your understanding?
22 MR. FERGUSON: Objection, asked
and answered.
23 THE COURT: Overruled.
24 THE WITNESS: That was my
understanding at
25 that time, there's no question, and now we

start

05645

1 compressing 20 years, but at the time
that's correct,

2 at the time, very time I went to the FTC
that was my

3 understanding.

4 BY MR. WEBB:

5 Q And this scientist goes on to
say, after he

6 says it was no different -- and by the
way, am I

7 correct this document, you don't recall
ever seeing

8 this document back at the time that you
were getting

9 ready to go to the FTC?

10 MR. FERGUSON: Objection, no
foundation as to

11 the date of this document. I don't believe
it was in

12 existence when the witness went to the FTC.

13 THE COURT: Overruled.

14 You may answer.

15 THE WITNESS: You are correct. I
did not see

16 this document until it was shown to me
during my

17 deposition, 20 years, maybe later than it
was

18 prepared.

19 BY MR. WEBB:

20 Q And you notice he goes on to say
this

21 document, after he talks about it doesn't
lower PAHs

22 any different than commercial filter
cigarettes. Goes

23 on to say, not only are we having to squirm
and

24 present weak and surreptitious arguments in
our first

25 paper.

05646

1 Is that referring to this paper
here, the

2 first paper, the one that was included in
the

3 materials to the FTC, the 12th
International Cancer

4 Congress? See, it's listed as number one
here.

5 See that?

6 A I don't know the answer to that
question, but

7 it could have been.

8 Q That was the paper -- that paper
was included

9 in what went to the FTC?

10 A Sure was.

11 Q Says here not only are we having
to squirm

12 and present weak and surreptitious

arguments in our
13 first paper, which may give us problems
with the
14 research, but worse, even if we get the
paper
15 accepted, it may haunt us down the way.
16 See that?
17 A Yes.
18 Q Did you ever have any indication
to believe
19 that the documents that you -- the
document that was
20 in this book to go to the FTC, which is
the -- it's
21 2C, I believe you find it there, 2C in the
--
22 A I think 2C is the abstract. I
think the
23 document may very well be 2D.
24 Q You are correct, it's 2D.
25 But so the jury knows, this paper
here is
05647
1 included in the materials that you were
going to take
2 to the FTC?
3 A It is.
4 Q Did you ever have any reason to
believe that
5 your client believed that it had to
actually squirm
6 and present weak and surreptitious
arguments in that
7 paper?
8 A No.
9 Q No one told you that?
10 A No.
11 Q No one hinted or suggested that to
you?
12 A No.
13 Q If they had, would it cause you to
pause and
14 hesitate before you gave it to the Federal
Trade
15 Commission, is that fair?
16 A Absolutely.
17 Q Goes on to say here, competition -
- that's
18 referring to other companies, is that
correct?
19 A Yes.
20 Q -- competition can check PAH level
with a day
21 or two of any -- with a day or two of any
report it
22 will become apparent to them as soon as
they see any
23 numbers that the leading commercial filter
cigarette
24 gives essentially the same PAH content as
the new
25 product.
05648

1 And it goes on to visualize something, right?

2 Says visualize, if you please, the PM

3 announcement --that's referring to Philip Morris, is

4 that correct?

5 A Yes.

6 Q He is speculating on what PM would do here?

7 A Yes.

8 Q He says PM will say Marlboro cigarettes

9 contain the same amount of PAH as the new Tame.

10 See that?

11 A Yes.

12 Q Tame was a new brand name that Liggett was

13 toying with to call this product, is that correct?

14 A That's my understanding.

15 Now I didn't think they had gone that far

16 with it, but you're right.

17 Q Results confirmed by NCI, that's the

18 National -- I'm not going to paraphrase it, it

19 says results confirmed by NCI and Foster D. Schnell.

20 See that?

21 A Yes.

22 Q He is saying here as soon as we put this

23 product out people will check out the PAHs and find

24 out it's a fraud?

25 A That's what he is saying.

05649

1 Q And he says here that, due to the declining

2 sales, people will say Liggett is desperate and out of

3 its mind. He speculates RJR president Tich, T I C H,

4 confirmed the PM announcement and said their Winston

5 cigarette had the same content of PAH as the new

6 product.

7 See that?

8 Again he was speculating within a few days

9 Reynolds will show their product, as far as PAHs, is

10 just good as this cigarette, right?

11 A That's what it says.

12 Q He goes on to say he has contacted Governor

13 Hunt of NC, North Carolina?

14 A Yes.

15 Q And Judge MacGruder of

Greensboro, North
16 Carolina, and have been given evidence
that new
17 products has the same PAH content as
regular filter
18 cigarettes, and then goes on to
speculate Judge
19 MacGruder has issued an injunction
against -- I'm
20 sorry, are you with me?
21 A Yes.
22 Q He goes on -- he's
projecting in the future,
23 you understand, right?
24 A Yes.
25 Q He says Judge MacGrude has
issued an
05650
1 injunction against Liggett & Myers
restraining
2 distribution and sale of Tame, and
Liggett is
3 appealing.
4 What the scientist is
saying in this
5 document, is that this company, Liggett,
patented this
6 product of lower PAHs, was telling the
scientific
7 community that PAHs were lowering
carcinogenicity, and
8 this scientist is saying, if we continue to
say that,
9 it's a fraud.
10 That's what he is saying here,
isn't he?
11 A That's not an unfair conclusion as
to what he
12 is saying in the bulk of his memorandum.
13 Q And you certainly were not aware
of that?
14 A Was not.
15 Q In fact, now that you have had
time to think
16 -- by the way, I again want to say, you did
not put
17 this document together, this 6461, is
that correct?
18 A Did not.
19 Q Although now that you found out
in your
20 deposition about this issue of PAHs, did
you go back
21 and look at this document, 6461, to see
if Liggett
22 actually structured this document that it
gave to you
23 for you to give to the FTC, did you go back
and see if
24 Liggett structured this document in a way
to conceal
25 from the Federal Trade Commission this
problem of the

05651

1 PAHs of this new product being no different than in

2 other commercial products already on the market?

3 A No.

4 Q Look at it together here with the jury.

5 One of the documents in this presentation you

6 were going to make to the FTC is the -- so you can

7 turn -- do you have the actual hard copy there? Turn

8 to what you have as tab 2E. This is the one we just

9 showed the jury a moment ago, we'll show the cover

10 page again. This is the document that was prepared by

11 Liggett and A. D. Little to describe this product.

12 Is that correct?

13 A Yes.

14 Q And this is the front page of that document.

15 Is that correct?

16 A Yes.

17 Q And this is in the book to go to the FTC,

18 this is in the book?

19 A Yes.

20 Q If you go -- we'll go by Bates stamp pages,

21 go in a way, go to Bates stamp page marked LGM00088,

22 see the Bates stamp page numbers?

23 A I got it.

24 Q See some bar charts there?

25 A Yes.

05652

1 Q What Liggett did, it provided to the FTC a

2 comparison of this new product -- I'm going to try to

3 focus this, I'm the worst in the world to use this, I

4 want you to know.

5 Focus the jury and you to the top of the page

6 as we go through this to answer my questions whether

7 or not Liggett intentionally deceived or was trying to

8 intentionally deceive the FTC with what they gave you.

9 If we look here, Liggett basically said -- gave you to

10 give to the FTC these bar charts that would compare

11 the middle says the new P R D, product prototype.

12 See that?

13 A Yes.
14 Q Tell the jury -- that is the XA
cigarette, is
15 that correct?
16 A Yes.
17 Q And Liggett is comparing that to
top ten
18 brands of other commercial cigarettes in
1977.
19 Is that correct?
20 A Yes.
21 Q And then they also compare it to
low tar
22 brands.
23 Is that correct?
24 A Yes.
25 Q And what they do, and they
actually compared
05653
1 this, they showed this comparison of the XA
cigarette
2 as to all different types of constituents
of cigarette
3 smoke -- runs on for eight pages, count the
pages --
4 runs on eight pages, compares its product
to
5 nicotine-free dry smoke, nicotine, carbon
monoxide.
6 See that?
7 First of all, count the pages -- I
should not
8 ask you too many questions.
9 A 7 or 8.
10 Q Show the jury an idea on the first
issue,
11 comparing, for example, their product to
various smoke
12 constituents, nicotine, carbon monoxide.
13 See that?
14 A Right.
15
Q
Huh
?
16
A
Yes
.
17 Q They go on to the next page,
compare the
18 levels of nitric oxide, hydrogen
cyanide, acrolein,
19 we can go on, we will together, phenols,
hydrogen
20 sulfide, catechol, acetaldehyde,
formaldehyde,
21 totealdehyde, ammonia, I'll spell this, H
C E P O M I
22 T R I L E, benzene?
23 A Pronounce the last one.
24 Q Nitrosamine, I think.
25 A Good.

05654

1 Q My question is, there is one thing
that is

2 interestingly absent, isn't there, sir?

3 A Yes.

4 Q Your client did not give the FTC a
bar chart

5 to compare the PAH level of its cigarettes
to the

6 other commercial cigarettes, did it?

7 A Not in this paper.

8 Q Do you find it anywhere in this?

9 A No. I'm saying not in this paper,
in terms

10 of the other discussions about the patent
and the

11 technology, there is some qualification.

12 Now in fairness, what I will tell
you is that

13 if this scientist, who I didn't know at the
time and

14 don't know now, right, then I agree with
all your

15 observations. I just can't agree that
the PAHs and

16 the PCAHs are the same in traditional
cigarettes as

17 they are in the XA cigarette, because I
don't know the

18 answer to that one. That was something in
my mind

19 always yet to be determined are the PCAHs
and PAHs,

20 something different in the XA.

21 I didn't know the answer, and the
people

22 I talked to didn't know the answer. In
fairness, if

23 this fellow is right, then these people,
this

24 assembled group of papers were wrong.

25 Q Not only wrong, but you at least
agree with

05655

1 me, by the way, a scientist at Liggett that
was

2 working on this project would know more
than you about

3 the PAH level?

4 A I would hope so.

5 Q You would expect that?

6 A Yes.

7 Q We saw what he said?

8 A Right.

9 Q And we also -- and by the way,
this, since

10 this product was patented because it
lowered the PAHs

11 wouldn't you think that's one thing that
you would at

12 least make a comparison on when you give
this to the

13 FTC?

14 A I think that's probably fair.
15 Q I don't think you ever realized
this until
16 today, do you now agree with me that
regardless of
17 whether it was higher or lower, you
certainly
18 believed -- you would believe, would you
not, that
19 your client would draw a bar chart that
compared the
20 most significant part of the invention
with other
21 commercial cigarettes?
22 A I agree with that. Let me say
this, that
23 what I've tried to say in my testimony
here is that I
24 felt that if they were going to promote
this or
25 advertise this product at all, they were
going to have
05656
1 to promote it, warts and all. One of the
things I
2 focused on was the fact they were able to
reduce the
3 tumorigenicity by a significant number,
88 percent,
4 and the cancerous tumors or
carcinogenicity by 77 to
5 100 percent.
6 The problem associated with some
of these
7 other scientific issues is this was a
starting point,
8 and indeed if there was an issue that I
didn't focus
9 on at the time about the PAHs or PACHs,
and the
10 quality of that production that ought
to have been
11 there, too.
12 In fairness, if this fellow
is right, even
13 his emphasis basically what he says in
this
14 memorandum, it's my feeling we should
publish only one
15 paper and that paper should deal with
the
16 reduction of tumorigenicity activity
and that goes on
17 to talk about the PAHs, I wouldn't
have gone along
18 with that, I wouldn't have gone along
with emphasizing
19 the benefits and not the negatives, if
there were
20 some, I just didn't know about the
issue.
21 If it's a valid issue it was
a problem that

22 we were going to run into full bore.

23 Q I'd like to return to my
question, here is

24 the question.

25 You certainly would agree
with me that that

05657

1 scientist knows more than you about
PAH levels?

2 A I don't know him. I agree he
ought to.

3 Q Number two, whether he is right
or wrong, you

4 do agree that since the documents I just
showed you

5 represented to the FTC that it was the
lowering of

6 PAHs that was causing the lowering of
carcinogenicity,

7 you, at least, would do a comparison of
PAHs, would

8 you not?

9 A You would think so.

10 Q And I know you didn't know this
until now, we

11 just went through all the constituents of
smoke.

12 When your client put together the
bar chart

13 they excluded that?

14 A They certainly don't have it
here.

15 Q When we get a recess I'll give
you a chance

16 to look at the whole document. My
question I'll ask

17 you after a break is whether you find
anywhere in

18 there that your client disclosed to the
FTC anything

19 about a comparison of PAHs in regular
commercial

20 cigarettes versus the XA.

21 Understand my question?

22 A I think the answer to that -- I
accept your

23 representation on that, the only
qualification I give

24 you is whether or not there is a
discussion in here,

25 and I quite frankly haven't looked at this
since

05658

1 September 8, 9, 10, is whether there is
any

2 representation in here about the quality
or the

3 character of the PAHs, PCAHs somehow being
altered by

4 the palladium nitrate condition. I don't
know the

5 answer.

6 Q I'm not a scientist, I don't want

to mislead

7 you. Forget what I can find, you look at
it in case

8 I'm wrong so?

9 MR. FERGUSON: Objection, this is
some kind

10 of a dialogue and not questions.

11 THE COURT: Sustained.

12 BY MR. WEBB:

13 Q Now that you -- I think I
covered it. I'll

14 make sure it's clear.

15 Those bar charts that we just
showed the jury

16 that don't show PAH, you're aware -- did
you ever ask

17 your client, do you have evidence that
the PAHs in

18 this new cigarette are different than the
PAHs in the

19 commercial cigarettes already on the
market?

20 Did you ask your client that?

21 A No, I did not. Remember, we're
talking about

22 this dialogue today, this is an issue
that truthfully

23 never surfaced at the time that this
document was put

24 together and certainly in any informal
discussions and

25 even after my informal discussions the
first time we

05659

1 started talking about this issue was
September 8,

2 9, 10 of this year.

3 Q Now I'm showing to you, this is
a book you

4 were going to give to the Federal Trade
Commission?

5 A Yes, right.

6 Q Those bar charts that we just
showed the

7 jury, they actually appear in this
document that

8 starts off by explaining to the FTC what
this product

9 is all about. I showed you a moment ago,
we could

10 read it again, the first paragraph is
telling the FTC

11 this product lowers carcinogenicity
because of this

12 lower levels of PAHs?

13 A That's right.

14 Q And then they don't even include a
comparison

15 of PAHs?

16 A In fairness go back to LGM
documents 000 --

17 one, two, three, four zeros 82 then follow
back. As

18 you see there is a presentation on PAH
concentrate and
19 control, PAH from the product -- PAH from
cigarette
20 smoke condensate.
21 I'm the wrong person to take you
through the
22 document, I gave up on math and physics in
1960 but
23 obviously my only qualification is I don't
know
24 whether these discussions about PAH help
answer your
25 concerns or not because I'm not the
scientist.
05660

1 Q Look at that page to start with,
that is the

2 --

3 A That's the first page then go to
the next

4 couple of pages.

5 Q Go to any page you want.

6 A Go to the next one.

7 MR. FERGUSON: Give me the page
number.

8 MR. WEBB: I believe he is on page
LGM 83, is

9 that correct?

10 THE WITNESS: That's right.

11 Q I put that up on the screen for
the jury.

12 This says, figure 3, inspectors of PAH
concentrate

13 from paralysis -- how do you pronounce
that word?

14 pyrolysis, that means burning
I'm told, and

15 cigarette smoke condensate see that?

16 A Some sort of infrared print
taken from

17 scientific analysis of PAHs I don't know
what this

18 chart means, I'm not the person to be
able to rebut

19 the premises we're on. May mean something
significant

20 here may not. Certainly is a new subject
for me.

21 Q Who would be the person that
could come in

22 and explain this to us?

23 A Only person I know would be
either Dr. Mold,

24 Butch Bryant or Bowen Ross.

25 Q Or the scientist that presented
the document?

05661

1 A The people at A. D. Little that
prepared the

2 document.

3 Q The page you showed me and the
jury, if we

4 read this, does not appear to be a
comparison of the
5 pH levels of cigarette smoke in new product
versus the
6 other ten commercial products on the
market, is that
7 correct?
8 A Yes. But then the next page talks
about pH
9 concentrates from smoke of control
cigarette pH
10 concentrates from the other cigarettes and
I don't
11 know whether we're getting closer to the
kind of thing
12 that should be in here and apparently are
not as
13 apparently as the bar graphs or not all I'm
saying is
14 in fairness I don't think I ought to be the
guy who
15 says no the document was defective
when in fact I
16 can't even analyze very properly some
of these
17 additional charts.
18 Q This page here does not
appear to be
19 comparing the XA cigarette with the other
ten
20 commercial products?
21 MR. FERGUSON: Object to the
predicate of the
22 questions, the examiner disagrees with
the witness,
23 argumentative.
24 THE COURT: Hear the question
again.
25 MR. WEBB: I'll rephrase it.
05662
1 Q The page we showed the jury
LGM00084 if we
2 read the English language this does not
appear to be
3 comparing the XA cigarette pH level with
say the other
4 top ten filtered cigarettes on the market
does it?
5 A May be worse than your suggesting
because if
6 you look at the bottom the page says mass
7 spectroanalysis of pH concentrate from
control
8 cigarettes which I assume are the
nontreated
9 cigarettes and from cigarettes treated with
palladium
10 and magnesium nitrate and in fact I suspect
if I
11 overlay these somehow I do get comparison,
maybe when
12 I overlay these things I do get something
that shows

13 me the PAH is basically the same in the XA
cigarette

14 as it is in the non-XA cigarette.

15 I don't know the answer to that,
all I'm

16 saying is I'm not the guy to talk about
this. I can

17 only talk about what was said to me at the
time which

18 I've already testified to.

19 Q I'll end this line of questioning
but you

20 don't need to be a scientist to at least
understand as

21 you look at these bar charts that you do
agree that

22 your client should have included a bar
chart that

23 compared the PAH levels, do you not?

24 A Based on this discussion I would
like to see

25 the same bar chart presentation for PAH or
PCHs also

05663

1 presented here.

2 Q Thank you.

3 And it's not there?

4 A No.

5 Q Now, am I correct you actually --
what makes

6 it worse that you -- in fact, I think you
said this a

7 moment ago you became aware while you were
working

8 this XA product that your client Liggett
was actually

9 drafting ads to promote this product that
actually

10 hyped the PAH levels, the lowering, is that
correct?

11 A They were drafted, they never were
approved.

12 Q I understand you didn't approve
them, I'm not

13 casting any blame on you at all.

14 So the jury understands you saw
ads that were

15 drafted by the advertising and marketing
department at

16 Liggett that was proposing that if we get
into the

17 market with this product, one the things
we'll tell

18 the consumers is about the lowering of
these PAHs, is

19 that correct?

20 A That was certainly -- I don't know
whether or

21 not they did that in-house or Norman,
Craig, Kummell or

22 elsewhere but that were certainly ad copies
they

23 proposed.

24 Q I'll find that, just a second
here.

25 MR. FERGUSON: 6340.
05664

1 MR. WEBB: Thank you.

2 Q I think I have an extra copy here,
too.

3 Maybe you can see these on the
screen. If

4 you have a problem --

5 A I've seen those recently. I saw
those

6 Tuesday, I think.

7 Q I'll show the jury because they
haven't.

8 What I'm showing is now a part -- so the
jury

9 understands there is an exhibit marked
State's Exhibit

10 6340 which has -- which I'll hand you now
which has a

11 lot of sample ads that represent how
Liggett at least

12 was proposing that they would advertise
this new

13 product if it got into the market, is that
correct?

14 A How it was being suggested to
Liggett by the

15 advertising agency that they advertise the
product.

16 Q Liggett has an advertising and
marketing

17 department, is that correct?

18 A Right, but in those days I have
trouble

19 knowing whether or not it was just a few
people

20 working for like Seidensticker, something
like that,

21 it wasn't a big operation.

22 Talking about the exhibits, it's
my

23 understanding about these tear sheets and
others that

24 they all came initially from NCK or Norman
Craig, the

25 advertising agency. These were not
generated

05665

1 in-house, these may have been generated in-
house, I

2 don't know.

3 Q You're aware when Liggett hires an

4 advertising company to try to develop ads
for it, the

5 only way the advertising company knows how
to draft

6 the ads is to get concepts from Liggett, is
that

7 correct?

8 A Concepts and underlying materials.

9 Q Otherwise they wouldn't know what

to draft in
10 the ads, would they?
11 A That's right.
12 Q Look at a couple of these. This
was one of
13 the proposed ads that Liggett was
proposing back at
14 this time.
15 Take a full scope of it then go
in.
16 MR. FERGUSON: Excuse me, Your
Honor. The
17 witness testified 3 times these came from
the
18 advertising agency and Mr. Webb started
out by saying
19 this is one of the proposed ads.
20 THE COURT: Sustained.
21 MR. WEBB: Strike the question.
22 Q This is an ad, as far as you know,
came from
23 the advertising agency working with
Liggett?
24 A That is my understanding.
25 Q Go to the heading up here, this
proposal. If
05666
1 we talk about the 1955 we had the first
anticavity
2 toothpaste, in 1964 we had the first low
cholesterol
3 margarine I think that is and in 1978 we
had the first
4 low PCAH cigarette.
5 See that?
6 A Yes.
7 Q If it turned out, by the way, that
the level of
8 PCAH was no different than other commercial
cigarettes
9 this would be misleading?
10 A This ad is terrible in all kinds of
reasons
11 but that would have been true, too.
12 Q There are others like this, are
there not?
13 A There are others that are even
worse.
14 Q Now let me leave behind PAHs.
15 A Good.
16 Q Talk about palladium, palladium is
one of the
17 chemicals -- strike that.
18 Palladium is one of the constituents
that
19 Liggett was adding to the tobacco or
straying it on
20 the tobacco as part of the XA technology,
is that
21 correct?
22 A Yes.
23 Q And you notice that palladium is a
heavy

24 metal that is actually extracted from platinum, is

25 that correct?

05667

1 A I think that's right.

2 Q We find it used, for example, in industries

3 such as the jewelry industry is one, is that correct?

4 A Yes.

5 Q You are also aware that palladium is toxic to

6 humans, is that correct?

7 A Yes.

8 Q And you are aware that palladium has been

9 identified by the scientific community as 10 carcinogenic, meaning that it can cause cancer in

11 humans, is that correct?

12 A Yes.

13 Q And you're aware and were aware back in 1978

14 and '9 that there were people in the public health

15 community that believe that you simply don't add a

16 toxic chemical to cigarettes when that chemical is a

17 carcinogen, were you aware of that view?

18 A I think so, yes.

19 Q Common sense tells you that if you take a

20 cigarette product that is viewed already by the public

21 health community as having major health problems, if

22 you decide to take that product that already has

23 problems and put another product that is toxic and

24 causes cancer, that would cause people to pause and

25 hesitate, wouldn't it?

05668

1 A Certainly gave me pause.

2 Q You actually advised Liggett that as far as

3 using this heavy metal palladium that Liggett had to

4 be careful with this XA project because it could be

5 alleged that the XA was more dangerous than other

6 commercial cigarettes because of unforeseen

7 consequences from the addition of palladium.

8 Did you tell Liggett that?

9 A You are probably reading what I said but I

10 certainly said that repeatedly, yes, I felt that very

11 strongly.
12 Q And so the jury understands the
problem was
13 that because palladium is toxic and causes
cancer, one
14 of the problems that Liggett tried to deal
with was to
15 be sure that the added palladium, this
thing they
16 added in, palladium into the tobacco
spraying it on,
17 that it did not seep, transfer into the
smoke that
18 smokers inhale into their lungs, is that
correct?
19 A That's probably a fair way of
saying it, yes.
20 Q In fact, I think you told us on
Tuesday that
21 Liggett added about one ounce of palladium
to every
22 cigarette?
23 A I'm obviously way off on that but
the fact is
24 whatever they added, whatever they added I
think the
25 number was -- we're talking about millions
of parts,
05669
1 it was sprayed on.
2 Let me say this, when I started
raising the
3 very issue you are talking about, without
anything
4 else having been said they assured me that
there would
5 be absolutely no difference in the
palladium treated
6 cigarette and regular cigarettes in terms
of palladium
7 residual.
8 I didn't believe it. I said we
needed to
9 test it, we couldn't possibly go on that,
and that's
10 the starting of all of testing done by A.
D. Little
11 and the Southwest Institute.
12 Don't hold me, if I said an ounce
per
13 cigarette obviously it's a great mistake
certainly it
14 was just minute parts per million of
palladium for the
15 process, but that didn't matter, we're
talking about
16 adding a toxic metal. We have the same
concerns
17 whether adding a little or a lot.
18 Q Fine. Correct the answer, I
accept that, no
19 problem.
20 Here is the question: Whatever

amount of

21 palladium they were adding, you were concerned that it

22 could be a problem?

23 A I felt that very strongly.

24 Q Did you ask them have you already done

25 testing before you asked me to go to the FTC, Mr. Meyer,
05670

1 before you ask me to go to the FTC have you, Liggett,

2 done new testing to see if in fact that palladium is

3 seeping into or transferring into the smoke that is

4 being inhaled or would be inhaled into people's lungs?

5 A If they had done any testing, it wasn't

6 persuasive. I think when I started raising these

7 issues is when they started doing the inhalation tests

8 we're talking about.

9 Q Do you know whether they had done any

10 testing as of the time that you began to represent

11 Liggett on this XA project had they already done

12 testing to find out one way or the other whether the

13 palladium in fact transferred into the smoke or

14 whether in fact it didn't transfer into the smoke

15 during burning of the cigarette?

16 A Actually I don't think so but I don't

17 remember.

18 I don't think they had.

19 Q Let me show you, I'll hand you exhibit in

20 evidence marked 6053, State's Exhibit. Yes, State's

21 Exhibit 6053. Put it on the screen for the jury.

22 This is a letter to a Dr. Paul Palm head

23 toxicology laboratory in Cambridge, Massachusetts.

24 See that?

25 A Yes.

05671

1 Q The letter is from the gentleman James D.

2 Mold, his title here is assistant director.

3 See that?

4 A Yes, in '75.

5 Q You think he became the director later, you

6 are not sure, I understand that, is that correct,
7 you're not sure?
8 A Yes.
9 Q He clearly was a major participant in this XA
10 project on behalf of Liggett as a research scientist,
11 is that correct?
12 A Yes.
13 Q Is he the research scientist you had the most
14 contact with as far as the XA project was concerned?
15 A Yes.
16 Q He says Dear Paul, we have completed our
17 evaluation of the transfer of palladium into smoke.
18 The amount found for 13 I cigarettes containing
19 palladium at .05 percent was .01 UG cigarette. This
20 would be further reduced by filtration to about .07 UG
21 cigarette.
22 See that?
23 A Yes.
24 Q Am I correct this letter that shows at least
25 -- not getting into how dangerous it is, this letter
05672
1 shows that the palladium is transferring into the
2 smoke?
3 A Right, and just to clarify my earlier answer
4 I had thought you asked me whether or not they had
5 done any testing. I did not consider any of this
6 stuff that was done in-house by them to be the testing
7 you were referring to. I didn't think it was
8 adequate, I see they had done this and I remember this
9 from my deposition but this was not the kind of
10 testing that I thought we ought to engage in, that
11 being outside testing accomplished by --
12 Q You agree this letter would tend to show you
13 by the time you became involved in the XA project your
14 client already knew, already knew that the palladium
15 at least does transfer in some amount into the smoke?
16 A Absolutely, yes.
17 Q And was this disclosed to the

Federal Trade

18 Commission, this letter?

19 A This letter wasn't in the packet
but

20 certainly -- I say this very honestly --
in my

21 informal discussions with the trade
commission guys

22 and ladies I made it clear that one of the
things that

23 we were waiting for was inhalation testing
on the

24 palladium additives because when I
described this very

25 informally about an exciting process, I
said we were

05673

1 awaiting testing which obviously would be
part of the

2 discussion.

3 So to me when we're talking about
the need

4 for inhalation testing to see if there is
any

5 residuals of palladium in the exposed
mice, clearly

6 that's sort of an admission by the very
fact what

7 we're doing.

8 I doubt that this is in the book.

9 Q I'll get to that before we get to
the

10 inhalation study.

11 The first issue is whether the
palladium in

12 fact transfers into the smoke as opposed
to not

13 transferring into the smoke.

14 Understand the question?

15 A Yes.

16 Q This document shows that at least
Liggett

17 knew at the time that you became involved
that some

18 palladium does transfer into the smoke that
would be

19 ingested if people smoked the product?

20 A Yes.

21 MR. FERGUSON: Objection,
misstates the

22 document.

23 THE COURT: Sustained.

24 BY MR. WEBB:

25 Q Does it say that we have completed
our

05674

1 evaluation of the transfer of palladium
into the

2 smoke?

3 A I think the document speaks for
itself, and

4 the answer to your question would be yes.

5 Q I'm not very good on these things

but am I

6 correct that the phrase .1 UG, UG refers to microgram,

7 is that correct?

8 A I think so.

9 Q If we use straight math, one-tenth microgram,

10 that's a hundredth nanogram, is that right?

11 A Sounds right.

12 Q Do you know whether transferring a hundredth

13 nanograms of palladium into the human lung for each

14 cigarette smoked, do you know whether that would

15 create a significant health risk?

16 A Do I?

17 Q Yes.

18 A No.

19 Q Now Liggett, you mentioned Liggett -- strike

20 the question.

21 At the time that you were putting together

22 that material -- strike the question.

23 At the time that Liggett was putting the

24 material together for you to go to the FTC in the fall

25 of 1978, the only test that Liggett had done to see

05675

1 whether or not there would be any harmful impact on a

2 human being ingesting a hundred nanograms of palladium

3 every time he or she smoked one of these cigarettes,

4 the only testing done was called a 30-day inhalation

5 study of rats, is that correct?

6 A I don't know whether that was part of a

7 continuing 24-month study. Yes, there was a 30-day

8 inhalation study completed at the time that you

9 referenced it.

10 Q It's included in that material, is it not?

11 A Yes.

12 Q The 2-year study wasn't concluded yet?

13 A I think we were 6 months into it but not

14 positive.

15 Q Hadn't been concluded?

16 A Had not.

17 Q The only testing you knew about that was

18 complete that would tell us anything one way or the

19 other on whether ingesting palladium into

a smoker's
20 lungs because it transferred into the
smoke, the only
21 testing that had been completed was a 30-
day rat
22 study, is that correct?
23 A That's my understanding, that's
my
24 understanding.
25 Q And the 30-day rat study showed
that during
05676
1 that 30 days the rats did not what is
called
2 bioaccumulate, they didn't accumulate
palladium in
3 their organs, is that fair to say?
4 A I think so.
5 Q What that study doesn't tell us,
does it, is
6 whether or not ingesting the smoke into
and having it
7 come in contact with your lung tissue
whether or not
8 that might have some negative health
effect on a
9 human's lung tissue?
10 A Let me see if I understand that.
If you are
11 saying does the 30-day inhalation study on
rats have
12 any extrapolation to humans, I guess that
would be the
13 first problem.
14 Q Answer that.
15 A No.
16 Q The second question would be
whether or not a
17 bioaccumulation could even be measured in
that 30-day
18 period and whether or not that would have
harmful
19 implications?
20 A I don't know the answer to that
because
21 that's really beyond me but it would
strike me if in
22 fact when you did an assay, you sacrifice
the animals
23 after the study and if you do a bioassay
and find no
24 palladium in the tissue, that's part of
the answer but
25 not the whole answer. That's my
understanding.
05677
1 Q At the time Liggett was talking
to you about
2 going to the FTC you at least were aware
that the
3 materials that were in this book did not
yet fully
4 address the issue as to whether or not

there would be

5 any danger to humans if they smoked a
palladium

6 cigarette and ingested some palladium
into their

7 lungs, that question had not been
answered at that

8 point?

9 A That's right.

10 Q That's not an insignificant
issue, is it?

11 A No. And as I tried to explain,
I thought I

12 did this Tuesday, I tried to explain I
thought what

13 would happen would be that we might very
well have

14 gotten into some longer term tests,
possibly even

15 involving large animals or humans, if this
thing had

16 gone forward the way it might have.

17 Q You have been looking at the rat
study first,

18 the rat study does not translate to humans,
doesn't

19 predict what would happen in humans, does
it?

20 MR. FERGUSON: Objection,
repetitive.

21 THE COURT: I think it's
been asked and
22 answered.

23 BY MR. WEBB:

24 Q The rat study, am correct,
advertised the

25 palladium cigarette with a filter on it or
do you

05678

1 know if that's the case?

2 A Let's take a second. Where in
this document

3 is the 30-day inhalation study?

4 Q I'll tell you where I think it
is.

5 MR. FERGUSON: Tab H, section
Roman numeral

6 VI, LGN000404.

7 MR. WEBB: I think Mr. Ferguson
is correct.

8 THE WITNESS: We won't take the
time to look

9 at this too careful.

10 BY MR. WEBB:

11 Q I couldn't tell if they tested
filtered or

12 unfiltered cigarettes. Do you know one
way or the

13 other?

14 If you don't, tell me.

15 A Don't know, without looking at
the document I

16 don't know.

17 Q Don't want to take the time now.

18 Here is the question, doesn't go
to science,

19 goes to common sense.

20 The letter that we just showed
the jury shows

21 that the filter reduces the amount of
palladium that

22 would be transferred to the smoke?

23 A Right.

24 Q Right, from one microgram to .07
microgram.

25 See that?

05679

1 A 30 percent reduction again.

2 Q Do you agree with me that because
-- I know

3 you don't smoke, but sometimes people do
pull filters

4 off cigarettes to get a stronger smoke.

5 Have you heard or believe people
do that

6 sometimes?

7 A I've seen that done on rare
occasions.

8 Q Here is the only question: Do
you agree with

9 me that before Liggett would market this
product that

10 had palladium in it, Liggett would need to
test it,

11 both the filter and unfiltered, just to be
able to get

12 some gauge as to whether or not the
unfiltered

13 product, if someone did that, took the
filter off as

14 to whether they would be harmed by smoking
that

15 product?

16 A We talked about the nitrate issue
and I

17 thought by adding nitrate ran into a
problem and that

18 was always addressed by adding a filter.
Honestly, I

19 never thought about having to warn the
consumer not to

20 detach the filter on the cigarette.

21 Q Not asking about warning, asking
about

22 Liggett as a responsible company would
anticipate that

23 and also test the unfiltered version?

24 A Looks like they did, looks like
they did

25 there.

05680

1 Q I'm talking about in the
inhalation study?

2 A If they did there, they probably
should have

3 done it here. But the premises, I'm

having trouble

4 with the premises because as I said
before, I haven't

5 noticed that phenomena very much.

6 Q I'll move to nitrates.

7 Besides palladium, the other
constituent that

8 the XA technology added into the tobacco
are what are

9 called nitrates, is that correct?

10 A Yes.

11 Q Are you looking for something?

I'll stop if

12 you're looking.

13 A No, I'm refreshing my own
recollection

14 continuously on this document.

15 Q Fine. But I'll stop in you want
to look at

16 it further.

17 A No.

18 Q I want to talk about nitrates for
a little

19 bit.

20 Liggett, besides the palladium
Liggett added

21 in the constituent called nitrate into the
tobacco, is

22 that correct?

23 A Right, as a part magnesium
nitrate, as I

24 understand it.

25 Q Nitrates were actually added into
the

05681

1 palladium technology. Ignore all my
spelling, my

2 worst nightmare.

3 Nitrates were added in two forms,
tell me if

4 I'm correct. Liggett experimented with
using a high

5 Burley tobacco that had a high level of
nitrates in

6 and of itself then added in additional
nitrates, is

7 that correct?

8 A Put this way, they either used
the tobacco

9 that was high in nitrates and maybe even
added

10 supplemental nitrates to that or added
more nitrates

11 to nonhigh in nitrate tobacco.

12 Q We're saying the same thing.

13 Now when you began to work on the
XA project

14 early on you became aware that when a
cigarette

15 manufacturer starts to develop a new
cigarette product

16 by adding nitrates into the product that
that did

17 create some potential serious health problems, is that
18 fair to say?
19 A Yes.
20 Q Explain that to the jury, and the jury heard
21 a Dr. Farone testify last week and I want to make sure
22 that you and I are on the same page.
23 The problem with adding nitrates in is that
24 nitrates when the cigarette burns, when that cigarette
25 burns, the nitrates create oxides of nitrogen, is that
05682
1 right?
2 A Yes.
3 Q Now the problem with that is that the oxides
4 of nitrogen interact with the alkaloids in the
5 cigarette and they create nitrosamines, is that
6 correct?
7 A Yes, and pronounced correctly, too.
8 Q Thank you, it's a miracle. I forgot the name
9 the other day.
10 And the problem with nitrosamines is that
11 nitrosamines are very carcinogenic, is that correct?
12 A That's my understanding.
13 Q And that means they can cause cancer, isn't
14 that correct?
15 A Yes.
16 Q So the -- did Liggett tell you that by the
17 time you became involved in this project in 1978 that
18 the scientific community had identified nitrosamines
19 as the single most dangerous constituent of cigarette
20 smoke?
21 A I don't know. I mean I don't know whether
22 Liggett told me that but I certainly was aware of
23 adding of nitrates was a problem.
24 Q My question was: Did you come to learn not
25 only was it a problem but the presence of nitrosamines
05683
1 was the single most dangerous constituent of cigarette
2 smoke or did Liggett tell you that, if you know?
3 A Put that way, as I discussed, I

wanted them

4 to affirmatively disclose the fact they added nitrate.

5 There were reasons for that, I don't know whether they

6 went to knowing that about knowing nitrosamines that

7 specifically, but certainly I knew it was a problem.

8 Q See how serious a problem it was, I'll show

9 you.

10 I'll show you a chart, this was drawn or

11 prepared by testimony of a scientist called Dr. Farone

12 last week. I'll show this to you, see if it is

13 consistent with your general understanding at the

14 time.

15 MR. FERGUSON: Misstated, one you were

16 showing was drawn by Dr. Burns, I think this one is --

17 MR. WEBB: Dr. Farone used this chart last

18 week.

19 MR. FERGUSON: Never mind.

20 He made me do it.

21 MR. LUVERA: I take full responsibility.

22 MR. WEBB: I'll give you responsibility.

23 Q See that okay?

24 A Yes.

25 Q This is a chart drawn for the jury last week

05684

1 when Dr. Farone was on the witness stand, I'll

2 represent to you?

3 A Okay.

4 Q Dr. Farone, a research scientist who used to

5 work at Philip Morris ranked what were called the bad

6 guys of cigarette smoke.

7 See that?

8 A Yes.

9 Q He ranked nitrosamines as number one,

10 aldehydes as number two, the PAHs that you talked

11 about as number three, the heavy metals as number

12 four, and the radioactive materials as number five.

13 See that?

14 A Yes.

15 Q Is that consistent with your general

16 understanding at the time that you began

to work for

17 Liggett on this XA project?

18 A Yes.

19 Q Did Liggett tell you that as of the 1978-1979

20 time period that the scientific community was

21 advocating that the tobacco companies find a way to

22 remove nitrates from tobacco?

23 A I don't recall that conversation that

24 specifically.

25 Q Dr. Farone told the jury that it would not be

05685

1 good enough to get 90 percent of the nitrates out,

2 have to try to get 99.999 percent out, if you can.

3 I'll represent he said that.

4 I'll ask you this question: If the goal of

5 the scientific community and of cigarette companies

6 was to get nitrate out of cigarettes, does it make any

7 sense for Liggett to being adding them in to make a

8 safer cigarette, does that make sense to you?

9 A I'll explain what they said to me. You will

10 see in my memo I said they had to affirmatively

11 disclose it. I know in the booklet when we went

12 through the bar charts certainly the nitrates are

13 listed. If you look at the nitrates, nitric oxide are

14 really somewhat at the top ten brand level but above

15 low tar brand level.

16 Some of the other bad guys, as they say, the

17 number two bad guys are somewhat lower, quite a bit

18 lower.

19 What they said to me, this is 20 years ago,

20 was we've added nitrates but the overall benefits are

21 significant.

22 I'm saying to them, look, from what you are

23 telling me we need to disclose that we're adding

24 nitrates, it's a problem, the other benefits would

25 hopefully be brought into a balanced discussion.

05686

1 Remember, this is 20 years ago. I realize science has

2 come a long way, I don't remember things quite as

3 specifically as Dr. Farone is testifying currently

4 about where science was.

5 I know that nitrates were a problem for me,

6 I wanted to affirmatively disclose that we added them

7 and I wanted this bar chart to have them -- the rest

8 of the discussion is now something that sort of takes

9 me currently as opposed to what was going on in '78.

10 Q Dr. Farone was testifying about what was

11 being done in 1978 to get nitrates out?

12 A We were adding.

13 Q I ask you, does that strike you as something

14 unusual?

15 A I thought it was a problem, that's why I

16 wanted to disclose it.

17 Q Based only the work you did for the tobacco

18 company, for Liggett, did you become aware over time

19 that science marches on and sometimes the scientific

20 community changed its mind about what it thought were

21 the most serious problems in cigarette smoke.

22 Did you have any discussions with Liggett on

23 that subject matter?

24 A Not really. I know that it was an evolving

25 picture.

05687

1 Q Did Liggett ever tell you that there was a

2 time in the 1960s that PAHs were actually viewed as

3 the most serious problem but that later changed as

4 smoke chemistry became more sophisticated and found

5 out nitrosamines were far more serious, was that

6 subject matter ever discussed with you?

7 A I don't think.

8 Q And you just told the jury that the bar chart

9 you are talking about shows that the -- let me get the

10 bar chart out to show the jury what we're talking

11 about.

12 A Nitric oxide piece is LGM89.
13 Q I'll show that to the jury since you
referred
14 to that page.
15 What this page shows is that
Liggett,
16 Liggett's experimental product, the
prototype, see
17 that, is pretty high in nitric oxide.
18 There's a number of cigarettes on
the market
19 lower in nitric oxide?
20 A Certainly the low tar brands are
much lower.
21 Q If the goal is to get 99 and nine-
tenths
22 percent of the nitrates out, if you add some
in, you
23 are bound to increase nitrosamines, aren't
you?
24 A Yes.
25 Q So this cigarette that your client
said that
05688
1 they might have you go see the FTC about
appears now
2 to be high in nitrosamines, at least
according to that
3 chart?
4 A Right.
5 Q And according to the memo this
morning was no
6 different in PAHs than other commercial
cigarettes?
7 MR. FERGUSON: Objection,
argumentative,
8 contrary to the testimony.
9 THE COURT: Overruled.
10 THE WITNESS: Based on this fellow
who I did
11 not know's memo, that's right.
12 BY MR. WEBB:
13 Q In this courtroom, as you see this
unfold, does
14 that -- does this cause you as a lawyer to
say maybe
15 the XA product was not what it was cracked
up to be?
16 A I'm the fellow who basically shot
down all
17 the ads wanted them to disclose nitrates,
wanted us to
18 start a dialogue before we promoted it at
all, wanted
19 to make sure what we were saying was
accurate, doesn't
20 change my view of what I felt in 1978.
21 What changes my view was the fact
that the
22 nitric piece, the nitric oxide piece might
be
23 relatively more important than it was
explained back

24 in '78.

25 Q Because I do think -- I don't want
to

05689

1 misstate it, you told the jury you actually
thought

2 back in 1978 the cigarette might have
health benefits

3 even though not proven yet?

4 A I thought it might, yes.

5 Q Does this cause you to reflect
upon that

6 testimony a little bit?

7 A I still don't know the answer to
that

8 question because we never got the dialogue
I thought

9 we should have had but that wasn't my
decision.

10 Q Am I correct the Liggett scientist
-- Judge,

11 I can go on.

12 THE COURT: Let's take a break.

13 (At this time a short break was
taken.)

14 THE COURT: Please sit down.

15 BY MR. WEBB:

16 Q Mr. Meyer, I need to return
actually to

17 something I forgot to ask you about. I am
going to go

18 back to these PAHs for just a minute. Are
you with

19 me?

20 A Yes.

21 Q The reason I am going back is that
several

22 times this morning when I was asking you
questions

23 about whether or not you learned that the
PAHs in fact

24 were no different or no lower than in other
commercial

25 cigarettes, you had told me several times
that you

05690

1 didn't know one way or the other whether
the scientist

2 who prepared Exhibit 6052, whether he was
correct or

3 not.

4 Do you remember that testimony?

5 A Yes.

6 Q You know Mr. Bowen Ross, do you
not?

7 A Yes.

8 Q Mr. Bowen Ross was the patent
attorney for

9 Liggett, is that correct?

10 A Yes.

11 Q You had confidence in Mr. Bowen
Ross, did you

12 not?

13 A Yes.
14 Q You thought he was a good lawyer?
15 A Yes.
16 Q You thought he was honest?
17 A Yes.
18 Q Did Mr. Bowen Ross -- and you told
us this
19 morning that Mr. Ross knew a lot more about
the
20 underlying technology of the XA product
than you did,
21 is that correct?
22 A Sure.
23 Q Mr. Bowen Ross is one of the
people that put
24 the materials together for you to give to
the FTC?
25 A Right.
05691
1 Q Is that correct?
2 A Right.
3 Q And so did you ever talk to Mr.
Bowen Ross
4 after you became involved in this project,
and at the
5 time that you were given this material to
give to the
6 FTC, 6461, at that time did you ever talk
to Mr. Bowen
7 Ross about whether or not he had learned
the very
8 thing that set forth in 6052, that the PAHs
were no
9 different and no lower than in other
commercial
10 cigarettes?
11 A Well, maybe I am confused. But
what I think
12 I testified to this morning was that there
were
13 discussions, and I'm sure I had those with
Bowen,
14 about the fact that it was not the
quantity, it was
15 the character.
16 And we talked about whether the
character --
17 could you have the same PAH or PCAH
presence in the XA
18 cigarette as you did in a conventional
cigarette, but
19 it was the character or quality of those
that was
20 different, and thus the tumorigenicity or
21 carcinogenicity was lower. And I don't
know who the
22 scientist is.
23 I keep stressing the -- this paper
tells me,
24 and I don't know when this paper was
prepared, was
25 that this fellow, even though he felt the
way he did,

05692

1 he still felt they ought to be promoting
this product

2 on the basis that it reduces tumors.

3 Now, in response to the Bowen Ross
questions,

4 I can only say that what I recall twenty
years ago

5 about Bowen is that it wasn't the quantity,
it was the

6 quality or character of them. That's what
he was

7 talking about. And I may have
misinterpreted it. But

8 that's what I remember about Bowen.

9 Q Did Bowen Ross ever tell you that
he also had

10 come to learn that there was no difference
in the PAH

11 levels between commercial cigarettes and
this new

12 experimental XA product?

13 A No difference --

14 MR. FERGUSON: Hearsay.

15 THE WITNESS: He might have. I
don't

16 remember him talking about levels as much
as character

17 or quality.

18 BY MR. WEBB:

19 Q Did he ever tell you the levels
were no

20 different?

21 A I don't remember, but he might
have. I don't

22 remember that being the stress there. What
I am

23 trying to say, it wasn't the quantity, it
was the

24 character of the PCAHs as modified.

25 Q Let me show you what is -- there
is a

05693

1 document that is in evidence as State
Exhibit 6460. I

2 don't have an extra copy, but I will show
it to you on

3 the screen.

4 A Okay.

5 Q This is in evidence, and it
purports to be

6 Mr. Ross's diary regarding the XA
product. I will

7 show you the front page of it.

8 A Has it been translated?

9 Q We are going to see if you can
help us on

10 this. And I'm going to come back out
here. I will

11 represent to you that this is Bowen Ross
-- this has

12 been identified as Bowen Ross's diary.

13 Can you see it, sir?

14 A Yes.
15 Q I will turn to a page that is
Bates stamped
16 at the bottom, Mr. Ferguson, JBR0054 --
Strike that.
17 Take that back. That is not the right
page.
18 I am going to go to a page that
is actually
19 Bates stamped JBR0102. And I'm going to
try to hone
20 in on this entry, if I can, to see if you
can read
21 that. I will read -- and tell me if it
appears that I
22 am reading this correctly.
23 Can you see it there?
24 A Starting with the advertising?
25 Q I will read it, and tell me if
I am wrong.
05694

1 It says, the advertising was
more or less
2 blown out of the water.
3 MR. FERGUSON: Excuse me. Can
we stop for
4 just a second?
5 Maybe counsel can show me -- my
number 102
6 page doesn't look like this.
7 THE WITNESS: 0102?
8 MR. FERGUSON: Yeah.
9 MR. WEBB: Can I see yours?
10 MR. FERGUSON: Mr. Phillips
straightened
11 it out. Thank you.
12 MR. WEBB: I think there is a
difference in
13 just Bates numbers. We both agree it is
in this
14 document.
15 THE COURT: That's fine.
16 BY MR. WEBB:
17 Q Sir, do you see there where -- I
am going to
18 read it, and tell me if I am reading
correctly, where
19 it appears to say, the advertising was
more or less
20 blown out of the water. Can't sell PCAH
because many
21 are lower, i.e., another "me too."
22 Did Bowen Ross ever tell you
that?
23 MR. FERGUSON: Objection, hearsay.
24 THE COURT: Overruled.
25 THE WITNESS: No. I would only
say to you
05695
1 before what he talked to me about was the
quality, not
2 the quantity.
3 BY MR. WEBB:

4 Q Did he ever tell you this?
5 A That you can't sell PCAH because
many are
6 lower? No, he never said that to me at
the time.
7 Q Let me show you another page in
his diary.
8 By the way, the date on that, just so the
jury knows
9 it, is July 12, 1970, so you can't see the
next
10 number.
11 Do you see that?
12 A Right. Who is at that meeting?
I went to a
13 number of those meetings. I take it I am
not at that
14 meeting.
15 Q It does not appear that you are.
Do you want
16 to look at it to be sure?
17 A I was at a number of those
meetings. He has
18 a line in there that I saw that says inter
NCK in full
19 glory, which would be his way of expressing
that they
20 would always have twenty people at a
meeting.
21 I'm sure I'm not at that meeting.
22 Q I will show you the next page, so
at least we
23 can see what year we are in.
24 On the next page there is an entry
that says
25 6/13/78?
05696
1 A Right.
2 Q So it would appear this is July
12th, '78?
3 A Yes.
4 Q Let me show you another entry in
Mr. Ross's
5 diary.
6 I am now reading from the number I
have, Mr.
7 Ferguson, Bates stamped JBR0151.
8 MR. FERGUSON: I have it. Thanks.
9 BY MR. WEBB:
10 Q And down at the bottom Mr. Ross
has written,
11 PCAH test now didn't show a difference?
12 A Right.
13 Q Do you see that?
14 A Right.
15 Q Did he ever tell you that?
16 A Well, I mean -- I'm trying to be
fair, and I
17 don't know where we are going, because what
I am
18 saying is if the test shows that they are
at the same
19 level, then that test doesn't show a

difference, if in
20 fact the difference is because of the
quality or the
21 character of the PCAH. In other words, you
might have
22 a cigarette with exactly the same number of
PCAHs, but
23 if the PCAHs in the XA cigarette act
differently, then
24 you have the lower incidence of tumors.
25 And -- as I think about this
morning,
05697

1 which is really the first time, the reason
why -- as I

2 said, even the scientist who is being
objective, to

3 say the least, says, go with the claim
on reducing

4 tumors, because that's the claim that
was clearly

5 valid in I think everyone's judgment.
How it got

6 there and whether it was PCAH or the
character with

7 the PCAHs, no one really knew.

8 Q This material that was put
together to give

9 to the FTC, did it explain that to the
FTC?

10 A Well, it sort of did. I mean, I
haven't --

11 again, this is sort of like taking an
exam, and I am

12 too old to take exams. At the beginning
of this

13 document, in the very first summary --

14 Q Which page are you on now?

15 A I am on page 7. LGM7, right in
the

16 beginning. What I am trying to say is --
I looked at

17 this very briefly during the break. And
they talk

18 about -- specifically in the subfractions

19 containing PCAHs, of which 3, 4, dash BP
is one

20 member.

21 When he attempted to subdivide
the PCAH into

22 one or more active components, we soon
discovered

23 there was a great number of individual
substituted

24 PCAHs that differed only slightly in
structure, many

25 of which seem to be contributing
cumulatively to the
05698

1 total tumorigenic activity. This I
remember, because

2 I was shown the summary before the book
was sent to

3 me. What we were trying to say is
something happened
4 to these PCAHs in this palladium nitrate
process that
5 changed the character of the PCAHs, and
got the
6 results we got.
7 But that's where Larry stops. I
mean, if I
8 have an explanation that something is
different going
9 on, that's what I am doing. I am not
trying to
10 mislead the commission. In fact, far from
it. I
11 don't want anything happening until the
commission is
12 completely satisfied. But in terms of the
specific
13 question, was it because they were lower
or changed or
14 whatever, then I can't say anything more
than I have
15 said.
16 Q When did you come up with this
idea that it
17 wasn't the levels, but the quality? When
did you come
18 up with that issue?
19 MR. FERGUSON: Objection.
Argumentative.
20 THE WITNESS: When you asked me
the questions
21 this morning, I am looking right here --
you asked me
22 to look at it. I start at the beginning.
And it
23 brings back, you know, the fact -- I don't
know what
24 was going on twenty years ago very well.
But when I
25 look at that it was not quality, it was
character.

05699

1 Because then when we go to our charts,
when we go to
2 our charts, what I see on the charts is in
fact -- if
3 I look at these charts which have the
infrared mass
4 spectroanalysis, and then I take them back
to the
5 others, I remember -- I remember adding --
or at least
6 them telling me they added nitrates, and
this last --
7 nitric oxide in this last page. Not the
last page
8 perhaps, but the one before the last
page, which is
9 nitro- -- whatever.
10 In response to disclosing the
fact that

11 although these bad guys, as you call
them, were --
12 many of them were reduced and many of
them were no
13 different. A couple were at least at the
level of the
14 highest top ten cigarettes. And I remember
talking
15 about that issue. And I remember being
told -- it
16 being told to me even then, what I am
getting into is
17 over my head, because numbers didn't mean
numbers.
18 Numbers couldn't really be analyzed because
there were
19 so many different things going on. And
that's where
20 you get into this discussion of subfraction
and
21 components.
22 Twenty years ago did I think this
was an
23 accurate document? Yes. Can we honestly
tear it
24 apart today? Probably.
25 Q The fact is, this document
directly told the
05700

1 FTC that it was the levels of the PCAH
that was

2 causing the smaller -- didn't this
document that was

3 put together for you directly tell the
Federal Trade

4 Commission it is the levels, the levels,
not the

5 quantity, the levels of the PCAHs that is
causing the

6 lesser number of cancer tumors?

7 MR. FERGUSON: Argumentative and
contrary --

8 THE COURT: Sustained.

9 BY MR. WEBB:

10 Q Let me show you this document.

Let's just

11 look at this document. This is exhibit --
do you want

12 to look at Exhibit 2E?

13 A Right. And I understand -- okay.
I'm sorry.

14 There is no question.

15 Q My only question is -- we will just
read it

16 together.

17 It tells the FTC that the
carcinogenicity of

18 cigarette smoke condensate towards mouse
skin has been

19 dramatically reduced by 77 to 100 percent
through a

20 combination of palladium metal, the
catalyst, with

21 blends high in Burley tobacco content, or
with lower
22 Burley tobacco blends supplemented by the
addition of
23 compensating amounts of nitrate salt.
This lowering
24 of carcinogenicity is associated with
decreases in the
25 level.

05701

1 Do you see that?
2 A Right. That's right. There is
no question
3 that this document, prepared by A. D.
Little and the
4 Liggett guys, is not -- is precisely
accurate as what
5 I would read my expanded summary to say,
because,
6 again, if in fact -- and I don't know when
this other
7 document was prepared or whether this was
inaccurate,
8 it is not just levels, it is obviously the
character
9 of the PCAH fraction and the components of
the PCAH
10 fraction.
11 So all I am saying, in fairness
to the guys
12 who put this document together, and in
fairness to
13 what I was talking about presenting to
the FTC, I am
14 not so sure that -- sort of taking your
suggestion
15 that I look at it, that there is not some
things in
16 here that qualify this statement. I
agree with you,
17 this statement, based on what we
discussed this
18 morning, is not as accurate as it should
be in this
19 paper.

20 Q Let me return to the issue of
the other
21 problem of nitrates. We will go back to
our chart.
22 So the jury understands what happened at
Liggett, is
23 that Liggett -- am I correct, when you
started working
24 on this project Liggett was very much
aware that if it
25 did not solve the nitrate problem it was
not going to

05702

1 be putting this cigarette into the
marketplace? Is
2 that a fair statement?
3 A If it did not reduce the
nitrates that were

4 higher because they had added nitrates,
the product

5 probably would not have been marketable,
yes.

6 Q And that's what I want to talk
to you about.

7 Because we are talking -- we are talking
about a

8 product that would have gotten into the
market, people

9 would understand what it is, buy it and
save the State

10 money.

11 Do you understand the issue?

12 A Yes.

13 Q We are talking about whether
this product

14 ever could have gotten into the market.
If the

15 nitrate problem did not get solved by
Liggett, this

16 product was not going anywhere, was not
even going to

17 be introduced in the market by Liggett,
is that

18 correct?

19 MR. FERGUSON: Asked and
answered.

20 THE COURT: Overruled.

21 THE WITNESS: That's my
understanding.

22 BY MR. WEBB:

23 Q And so Liggett decided to start
experimenting

24 to see if it could solve the nitrate
problem, is that

25 correct?

05703

1 A I believe so.

2 Q In fact, so the jury
understands, you used

3 some numbers on your direct examination
about how this

4 product reduced tumors, both cancer
tumors and

5 noncancer tumors by 88 to 100 percent, is
that

6 correct?

7 A Right.

8 Q That actually -- there was a
mouse skin -- I

9 will put MSP, for mouse skin painting.
Those numbers

10 that you told the jury about, they came
from what

11 Liggett -- for what was known as
Liggett's first mouse

12 skin painting test, is that correct?

13 A I think so.

14 Q And Liggett then decided to find
out whether

15 it could solve the nitrate problem by
reducing the

16 nitrates, and Liggett then, as scientists
are supposed
17 to do to see if they can reproduce the
test, they
18 lowered the nitrates and they did a
second mouse skin
19 painting test to see what the results
were, is that
20 correct?
21 A Well, I think what I testified
to -- what I
22 understood is in the second test they
added less
23 nitrate by using a Burley tobacco higher
in nitrates,
24 and that was the premise on which the
second test went
25 forward.
05704

1 Q Right. But by doing it that way
they were
2 lowering the overall nitrate level? They
didn't add
3 any extra nitrate in at all, did they?
4 A It was my impression they might
have added
5 some extra nitrate. I will put it this
way, whether
6 it was the same level of nitrate as the
first test,
7 which it was my understanding or not, the
second test
8 was -- the nitrate that came to the product
was
9 principally from the tobacco, the Burley
tobacco.
10 Q All right. So then if it was from
the Burley
11 tobacco, that means they didn't add in the
extra
12 nitrate?
13 A I don't know whether they did or
not. I know
14 that the test was a failure, but I don't
know whether
15 it was because it was nitrates in the
tobacco or the
16 level of nitrates.
17 Q Well, were you aware that Liggett,
when it
18 did its second mouse skin painting test,
was trying to
19 see if it could lower nitrates and see if
the product
20 would still work?
21 A Counsel, I don't think we
disagree. What I
22 am saying is I don't know whether it is
lower nitrates
23 or lower added nitrates by using tobacco
that was high
24 in nitrates to begin with. I don't think
very many

25 people use Burley tobacco for that reason.
They were
05705

1 using a tobacco that was high in nitrates
in an

2 effort to lower the additional amount of
nitrate they

3 would have to add. That was my
understanding. I

4 might be wrong.

5 Q Your understanding is they were
trying to

6 lower the extra nitrate they had to add
in?

7 A Right. There is no question
that's right.

8 Q What they found out is by not
adding in the

9 extra nitrate this product did not work?

10 A Absolutely, did not work.

11 Q Didn't reduce the tumors on the
backs of

12 those nice at all compared to commercial
cigarettes?

13 A That's my understanding.

14 Q And then Liggett had a problem,
so it went

15 back and it did a third mouse skin painting
test and a

16 fourth mouse skin painting test. And what
it found

17 out from those last two tests is that it
could not

18 make the product work, even on mice,
without keeping

19 the nitrate level -- the added nitrate
level at a

20 higher amount, is that correct?

21 A I think that's right.

22 Q So what Liggett found out is
that it was not

23 doing -- strike the question.

24 Now the problem with the mouse
skin painting

25 test, though -- and Liggett recognized
this problem,

05706

1 did it not -- is that by adding in the
nitrates and

2 increasing nitrosamines the mouse skin
painting test

3 did not tell Liggett whether or not the
increased

4 nitrosamines would actually cause
additional tumors in

5 mice?

6 Is that correct?

7 A I don't understand the question.

8 Q Let me break it down. You are
aware, are you

9 not, that nitrosamines are what are
referred to as

10 organ specific carcinogens, that means

that whatever
11 cancer causing activity they have they
cannot be
12 detected in a skin test?
13 A I will accept that.
14 Q I am asking you if you knew
that?
15 A It may have been said. It is
not something
16 that I use very frequently in my work. I
am not a
17 scientist. I am not a doctor.
18 Q I don't want to -- let me give you
a Liggett
19 document that is in evidence that is marked
as AS1297.
20 I will ask you to look at that document so
the jury
21 can understand where we are going here.
This is a
22 Liggett document.
23 Do you see that, sir, it was
produced to us
24 by Liggett?
25 A Yes.
05707
1 Q And do you see that it is a memo
to Mr.
2 Kensler. Do you see that, sir?
3 A Yes, I do.
4 Q And the subject is skin painting
workshop.
5 Do you see that?
6 A Um-hum.
7 Q Do you see that?
8 A Yes.
9 Q And I want to call your
attention down here
10 to -- I want to make sure -- find out --
organ
11 specific carcinogens, e.g., nitrosamines,
are not
12 detected in skin assays.
13 A Yes.
14 Q Do you see that?
15 A Yes, I do.
16 Q Were you aware at the time you
were getting
17 ready to go to the FTC that those mouse
skin painting
18 tests wouldn't even tell Liggett whether
or not the
19 nitrosamines would cause additional
tumors in mice?
20 A No, I wasn't.
21 Q And that was not disclosed --
was that
22 disclosed in this document that was put
together to
23 give to the FTC?
24 A Well, I wouldn't think so, no.
25 Q Now, when you began to work on
the XA

05708

1 project, did some of the Liggett
scientists tell you

2 that they had become very, very concerned
about this

3 increase of oxides of nitrogen that was
resulting from

4 adding in the nitrates?

5 MR. FERGUSON: Objection. Asked
and

6 answered.

7 THE COURT: Sustained.

8 BY MR. WEBB:

9 Q Well, let me show you a document
that is in

10 evidence. I am going to give you now a
document that

11 is marked as State Exhibit 6057. I would
just ask you

12 to look at the first page. And I will show
you what

13 part of this document I want to talk to you
about.

14 But this document I will put on the
screen for the

15 jury here.

16 This is a document marked as
Exhibit 6057

17 which is a document dated April 1,
1975. Do you see

18 that, sir?

19 A Yes, I do.

20 Q And it is to Dr. Mold, do you
see that?

21 A Yes.

22 Q And it is from this scientist
A. G.

23 K-e-l-l-i-a-n-o-s, who you said you
didn't know?

24 A Yes.

25 Q And Mr. T. B. Walker. Do you
know Mr.

05709

1 Walker?

2 A No, I don't recall Mr. Walker
either.

3 Q It says that the topic is the
agenda for

4 discussion of plans for marketing a
biologically

5 approveable cigarette. Do you see
that?

6 A Yes.

7 Q We will look at the first
couple of

8 paragraphs. Just so you know what the
document is,

9 the objective is to get into the market
as soon as

10 feasible with a cigarette expected to be
biologically

11 approveable. The meeting with ADL -- that
is Arthur

12 D. Little; is that correct?
13 A Yes.
14 Q -- personnel is intended to
assess our
15 position, foresee critical questions and
plan action.
16 The purpose of this memorandum is to
present the high
17 points of the makeup of the safe cigarette
samples
18 developed and to delineate some of the
possible toxic
19 hazards that need to be considered before
marketing a
20 new product of the type under
consideration.
21 Do you see that?
22 A Yes.
23 Q Do you agree that Liggett has a
24 responsibility to do that, before it puts
a new
25 product into the market?
05710
1 A Sure.
2 Q Well, there is no doubt in your
mind about
3 that, is there?
4 A No.
5 Q Now, if we go over -- I am going
to have you
6 go over to the page that says Bates stamp
611 at the
7 bottom. I think it actually is page 5.
It is hard to
8 read on the Xerox.
9 A Okay.
10 Q This document says -- this
Liggett document
11 says, as indicated above, increased
nitrate levels in
12 tobacco will result in increased amounts
of oxides of
13 nitrogen in cigarette smoke.
14 Do you see that?
15 A Um-hum.
16 Q The very thing we are saying on
this chart?
17 A Right.
18 Q Such increase is considered to
be detrimental
19 due to the acute -- do you see that,
acute toxicity,
20 of oxides of nitrogen and the possible
formation of a
21 variety of nitrated and nitrosated
products in the
22 smoke.
23 Do you see that?
24 A Yes, I do.
25 Q With respect to acute toxicity
of oxides of
05711
1 nitrogen, we have some advantage in that

most of the

2 oxides of nitrogen in smoke consist of
NO, and NO is

3 about one-fifth as toxic as NO₂.

4 Do you see that?

5 A Yes.

6 Q That is nitrogen dioxide?

7 A Yes.

8 Q NO is nitrogen oxide, is that
your

9 understanding?

10 A That is my understanding.

11 Q And NO₂ is nitrogen dioxide?

12 A Right.

13 Q It says, nonetheless, the
quantities involved

14 are far too great to make this advantage
meaningful.

15 Do you see that?

16 A Yes.

17 Q Now, if we go over a couple more
pages we get

18 to this issue of nitrosamines. And the
Liggett -- the

19 Liggett scientists are telling Dr. Mold,
aside from

20 speculation about formation of N-
nitrosamines in vivo

21 -- in vivo means in a live person?

22 A In a human.

23 Q In a human, is that correct?

24 A Yes.

25 Q So they are talking, aside from
speculation

05712

1 about the formation of nitrosamines in
humans in the

2 air passages of the smoker, even beyond
that he says,

3 we are gravely concerned about the
possible level of

4 N-nitrosamines in the smoke prior to
inhalation. Our

5 concern arises from the fact that several

6 N-nitrosamines have been found to be
carcinogenic,

7 mutagenic or teratogenic toward laboratory
animals and

8 the implications of similar effects in man
is present

9 whether true or not.

10 We cannot with any reliability
provide at

11 this time a list of which are carcinogenic
and which

12 are not, although there is some evidence
for believing

13 any N-nitrosamine incapable of forming a
hydroxymethyl

14 group adjacent to the amine nitrogen may
not be

15 carcinogenic.

16 Do you see that?

17 A Yes.

18 Q My question, sir, did you have discussions

19 with scientists at Liggett about the nature or the

20 degree of their concern about this product using

21 increased nitrates, creating oxides of nitrogen,

22 creating nitrosamines and causing cancer, did you have

23 discussion with him about the depth, in this case,

24 their grave concerns?

25 A Truthfully, no. The only discussions we had

05713

1 were the fact that the additional nitrates presented a

2 problem. They felt they had solved that problem, in

3 fact to the degree they resisted my recommendation

4 that we affirmatively disclose the addition of those

5 nitrates.

6 When I say -- I talked with Dr. Mold about

7 this. I don't know the other gentleman. I talked

8 with the others. I never saw this document. This is

9 probably just before the period of time that they

10 start talking with me about the project. But

11 certainly this document -- your handing it to me a

12 minute ago is the first time I have seen it. I was

13 not aware of the depth of their concern, if that is a

14 fair characterization.

15 Q Let me ask you this. You told us I think in

16 1979 at some point Mr. Greer told you that at that

17 time he did not want you to go have a formal meeting

18 with the FTC, is that correct?

19 A At some point. Yeah, in the '79 time frame,

20 yeah.

21 Q Now -- but you continued to work and did

22 legal work for Liggett up until 1986, is that correct?

23 A Yes.

24 Q As far as whether this product would ever

25 have gone into the market, did you eventually become

05714

1 aware that Liggett itself, its scientists
had come to

2 the conclusion that this product was just
too

3 dangerous and that the scientists were
recommending

4 you can't put it into the market?

5 A Truthfully, no one ever expressed
that view

6 to me.

7 Q Let me show you a document that
is in

8 evidence. I will now hand you a document
that is

9 marked as Defense Exhibit AS001301 in
evidence. And

10 I would ask you to look at it. And I will
put it up

11 here for the jury. Let's go back and look
at this

12 document together. This document is dated
September

13 24th, 1984, is that correct?

14 A Yes.

15 Q You were still doing work for
Liggett at that

16 time, according to your testimony, is that
correct?

17 A Yes.

18 Q And this is a memo to a Mr. R. L.
Kersey from

19 Mr. R. H. Wallack, W-a-l-l-a-c-k.

20 Do you see that, sir?

21 A Yes.

22 Q Were those Liggett scientists you
had contact

23 with?

24 A I don't remember Wallack, but I
remember

25 Kersey.

05715

1 Q Let's see what they are saying
about this

2 product.

3 It says, some concerns regarding
high nitrate

4 level in XA cigarettes. Do you see that?

5 A Yeah.

6 Q So they are talking about the
subject matter

7 I am asking you about, you understand that?

8 A Yes.

9 Q It says here that recent
literature

10 references have created some concerns
regarding the

11 high nitrate levels in the XA product.
These

12 published studies may be brought to bear
against

13 Liggett & Myers should the product be
marketed in the

14 future.

15 Do you see that, sir?
16 A Yes.
17 Q Now, let's just look at number 1 -
-
18 MR. FERGUSON: Your Honor, I
object. I am
19 assuming he is trying to refresh the
witness's
20 recollection, since he didn't have any. I
think the
21 proper thing to do is show him the document
and see if
22 it refreshes his recollection, rather than
showing it
23 to the jury.
24 MR. WEBB: This document is in
evidence.
25 MR. FERGUSON: For the purposes of
05716
1 refreshing, I think it is the improper way
to do it.
2 THE COURT: Overruled.
3 BY MR. WEBB:
4 Q It talks about these -- do you see
where this
5 scientist is talking about certain
scientific
6 literature that is raising questions about
cigarettes
7 with high nitrate levels?
8 You understand the issue?
9 A Yes.
10 Q It says a paper published by D.
Hoffmann.
11 Now, did you -- on the work that you did
for Liggett,
12 did you come to know of a Mr. Dietrich
Hoffmann who
13 was a renowned researcher in the area of
smoking and
14 health?
15 A I knew of his name, yes.
16 Q In fact, I believe -- did some of
his
17 materials get put into this exhibit to go
to the FTC?
18 A No.
19 Q So you are not doubting Dr.
Hoffmann as being
20 a very well-known smoke researcher?
21 A Oh, no.
22 Q It says, a paper published by D.
Hoffmann, et
23 al., Carcinogenesis, London, it gives some
cites
24 there, gives smoke data on cigarettes to
which
25 elevated levels of nitrate, as sodium
nitrate, have
05717
1 been added. These data show, as expected
from other
2 earlier published work, lower yields of

tar, nicotine

3 and benzapyrene, a measure of PCAH content.

4 Do you see that?

5 A Yes.

6 Q However, he suggests that higher levels of

7 oxides of nitrogen and N-nitrosamines may increase the

8 carcinogenic potential of whole smoke. He thus

9 recommends that the nitrate content of tobacco

10 products should be reduced.

11 Do you see that?

12 A Um-hum.

13 Q Now, do you agree with me, Mr. Meyer, and I

14 know you are a lawyer, not a scientist, do you

15 agree with me if the XA product, because it increases

16 nitrates, is going to actually increase the risk of

17 cancer, you would not recommend to Liggett that they

18 put that product into the marketplace, would you?

19 A No.

20 Q It goes on to say here, a publication by

21 Vello Norman. It says he is at Lorillard.

22 Do you see that?

23 A I see that.

24 Q Interesting. Actually Vello Norman had been

25 at Liggett, had he not?

05718

1 A Yes. If that's the same Vello. I don't know

2 too many Vellos.

3 Q There are probably not too many Vello Normans

4 working for the tobacco industry.

5 A Probably not.

6 Q Vello Norman is the person listed on the

7 patent as the inventor of the XA technology?

8 A One of them.

9 Q One of them?

10 A Yes.

11 Q Let's see what he as the inventor is

12 now saying in 1984. It says a publication by Vello

13 Norman -- did you understand he had left Liggett and

14 gone to Lorillard at some point in time?

15 A I knew that he had gone to another

16 competitor. I did not -- I see it was Lorillard. I

17 actually thought it was Brown &
Williamson at some
18 point.
19 Q Well, at least this says
Lorillard.
20 Lorillard, and it goes on, he
talks about a
21 publication, gives the effect of added
nitrate, as
22 magnesium nitrate -- I think that is the
form that was
23 actually being used by Liggett, magnesium
nitrate --
24 A Yes, it was.
25 Q -- in the XA technology, is that
correct?
05719
1 A Yes.
2 Q The effect of added nitrate as
magnesium
3 nitrate on delivery of increased levels of
oxides of
4 nitrogen and hydrogen cyanide in cigarette
smoke.
5 These authors not only measured NO,
nitrogen oxide, in
6 mainstream smoke, but also in sidestream,
and reported
7 levels of five to ten times that found in
mainstream.
8 With the present public concern about
secondhand
9 smoke, this may be a problem and we should
plan on
10 determining sidestream levels for our
product.
11 Do you see that, sir?
12 A Yes, I do.
13 Q Now, I want to know, back in 1978
when you
14 were getting ready to go to the FTC
and trying to
15 convince the FTC to allow the
marketing of this
16 product, did you have any information that
you were
17 going to call to the attention of FTC that
the
18 sidestream smoke -- that means the smoke
that other
19 people are going to breathe, is that
right?
20 A Yes.
21 Q Sidestream means the smoke coming
off the end
22 of the cigarette, sometimes called
secondhand smoke?
23 A Yes.
24 Q Did you have any information that
the
25 secondhand smoke or sidestream smoke that
other people
05720

1 around someone smoking this palladium
cigarette, the
2 XA cigarette, that they might be
encountering five to
3 ten times the amount of nitrogen oxide as
found in
4 mainstream smoke?
5 A No, not that specifically. In
fact, it was
6 actually quite different than that. I
looked at two
7 things. I looked at the introduction and
I looked at
8 these charts. The hydrogen sulfide, which
is in this
9 family, hydrogen cyanide, et cetera, was so
much lower
10 with the XA cigarette that hydrogen cyanide
reference
11 is puzzling to me. What it does underscore
to me,
12 very honestly, is when we first tossed
these booklets
13 into the FTC, and they then called the
health
14 authorities, that not only competitors but
the
15 American Cancer Society, everybody was
going to start
16 to come in and really tear at this
technology.
17 And the fact that Vello Norman,
who is very
18 much involved in the technology, is now a
naysayer, or
19 critical, only underscores my belief, you
know, that
20 that process was going to be a crucible --
a crucible
21 process as to whether this technology made
any sense
22 or not.
23 Now, in 1984 I was not aware of
this
24 document, I was not aware that Vello was
doing these
25 sorts of the things. It makes me believe
that I was

05721

1 absolutely right in my analysis back in '78
saying
2 that this was really going to be a crucible
period for
3 this technology.
4 Q By the way, in that same document
you are
5 telling the jury about where you talk about
the
6 crucible test of vetting, you also said in
there you
7 actually thought this product might have
health
8 benefits for people?

9 A Honestly, everybody I talked to, I
mean
10 everybody I talked to said that to me.
No one -- I
11 mean, I feel like maybe I was in the
dark. But the
12 fact is everybody I talked to all said
that it was
13 going to be the biggest thing since
sliced bread,
14 depending on whether you like sliced
bread.
15 Q Are you now learning in this
courtroom, as we
16 look at these documents, that maybe it
wasn't going to
17 be the second coming of sliced bread?
18 MR. FERGUSON: Argumentative.
19 THE COURT: Sustained.
20 THE WITNESS: It --
21 THE COURT: Excuse me. No
question is before
22 you.
23 THE WITNESS: No question. This
is a
24 different role for me.
25 BY MR. WEBB:
05722
1 Q Let's go on and look at what is
said in this
2 document.
3 This scientist at Liggett, Mr.
Wallack, it
4 says Philip Morris has been issued a number
of patents
5 or methods for denitrating tobacco,
specifically in
6 the preparation of reconstituted sheets for
tobacco
7 use.
8 Now, this is what Dr. Farone told
the jury
9 about last week, about Philip Morris was
trying to get
10 nitrates out of cigarette smoke. Did you -
- did you
11 know back at that time in 1978, 1979 -- did
anyone at
12 Liggett tell you that at the same time
while Liggett
13 was adding nitrates into tobacco, other
companies were
14 trying to take it out in order to make
cigarettes
15 safer?
16 A Actually we had a discussion,
because
17 interestingly enough the comparative test
was always
18 Marlboros, because that was the number one
cigarette,
19 and there was discussions about the fact
that Philip

20 Morris was in fact trying to reduce the
levels in
21 Marlboro, because I think -- as I recall,
Marlboro
22 were actually higher than the XA
cigarette. And here
23 is the number one cigarette with higher
levels than
24 the XA project. And I was told
specifically that
25 Philip Morris was working on reducing those
levels.

05723

1 But that is now in 1978, remember. That is
not '84.

2 Q That's fine. I am talking about
1978.

3 When you found out that another
cigarette

4 company was actually trying to get nitrates
out of the

5 cigarette to make it safer, did that at
least cause

6 you to pause and hesitate and say to
yourself, why is

7 Liggett adding it in if someone else is
trying to get

8 it out?

9 A Truthfully, it convinced me I was
right. I

10 was the person telling them they couldn't
do it the

11 way they were trying to. It made me more
concerned

12 than ever that they disclose exactly what
they were

13 doing.

14 Q Disclose to anyone who bought it
increase in

15 the oxides of nitrogen may be a health risk
for them?

16 A Yes.

17 Q By the way, when you told Liggett
that if you

18 are going to sell this product you are
going to have

19 to actually warn people of the fact that
you are

20 adding these nitrates in and creating all
these oxides

21 of nitrogen, it will be dangerous --

22 A May.

23 Q May be dangerous to yourself.

24 Did Liggett tell you they might
have trouble

25 selling that product to smokers?

05724

1 A Liggett thought that they were
going to sell

2 more cigarettes than the world could
produce palladium

3 for them to produce.

4 Q We will -- I will get to that a

little bit

5 later. Let's go on and finish this document.

6 It says, recent papers have indicated a

7 growing concern for levels of nitropolycyclic

8 aromatics in air pollution, automotive exhausts and in

9 tobacco smoke. Many of these nitro PCAH compounds

10 have been determined to be highly carcinogenic, often

11 more so than the parent PCAH. It says, we have not

12 looked for this class of compounds in our smoke

13 fractions, and I would expect them to be present to

14 suggest -- I'm sorry, but I would expect them to be

15 present to a greater extent in the higher nitrate

16 cigarette smoke. I suggest that we do some studies on

17 the extraction, identification and quantification of

18 these compounds in our smoke fractions.

19 Do you see that?

20 A Yes.

21 Q Now, you just told the jury a moment ago that

22 you understood Liggett had already done some type of

23 fractional analysis of the PCAHs in order to determine

24 that it was reducing, or somehow the quality of the

25 PCAHs was better in the XA product?

05725

1 A They clearly had done some. I mean, they

2 evidently, according to this scientist, had not done

3 this specific one, but they clearly had done some,

4 because I saw those -- I saw those papers at the time.

5 I didn't understand them completely. But that goes

6 back to whether or not it is the PCAH level or the

7 character of the PCAHs.

8 Q And this memo is suggesting in 1984 that the

9 character of the PCAH in this cigarette may actually

10 be worse for humans?

11 A If this fellow is right, there is another

12 issue of whether or not this particular nitro PCAH

13 compound has been properly identified and

has been
14 measured in the XA project.
15 What astonishes me about this,
in 1984 I am
16 surprised they even had -- unless they have
were doing
17 this for the record, I am surprised they
even had any
18 activity on XA at all.
19 Q Actually -- you can see from this
document
20 Liggett in 1984 is still pursuing the XA --
the
21 project?
22 A Apparently.
23 Q You didn't know that?
24 A I think I testified I did not know
what
25 happened to this project after my direct
involvement.
05726
1 Q Here is what I want to ask you. I
take it,
2 by the way, this man who is a scientist who
states
3 here in this Liggett document that he
actually expects
4 this particular component of PCAH to be
higher in the
5 XA cigarette --
6 A He expects that in a high nitrate
cigarette
7 you might see more of that nitro PCAH
compound.
8 Q We know the XA was a high nitrate
cigarette?
9 A That's right.
10 Q And so this problem is raising a
question as
11 to whether these PAHs that were being
reduced -- even
12 the PAH reduction may be creating another
problem in
13 this product. At least that's what this
scientist is
14 saying?
15 A Right. And the reason I am having
trouble
16 with this is, I know that I see at the time
that
17 Marlboro is higher in nitrates than the XA
project,
18 and if that is true -- and I'm not sure that
I accept
19 that as true or accept this as true. It
would mean
20 Marlboro, which is the number one cigarette,
is more
21 dangerous than the XA project, and this is
all
22 premised on whether the XA would sell. They
are all
23 saying it will sell.

24 I am saying you can't sell it
without add --
25 when you add nitrates without disclosing,
even though
05727
1 it is lower in nitrates than the number one
cigarette.
2 Q Now that you see that, does this
cause you to
3 pause and hesitate on your conclusion it
might have
4 had health benefits?
5 A It might have been the number one
cigarette,
6 but it does make me wonder about these other
issues
7 that were not discussed at the time.
8 Q I take it as a lawyer you did not
want to be
9 part of any plan to get the FTC to allow
Liggett to
10 market a cigarette that in fact would be
more
11 dangerous for people?
12 A I wanted to do exactly the
opposite. I
13 wanted to make sure that before this product
went to
14 market everybody had a shot at it.
15 Q Let's see what this scientist
concludes on
16 the next page.
17 This Liggett scientist, Dr. Wallack
says, all
18 of these references point toward the
desirability of
19 reducing the levels of nitrate in tobacco
intended for
20 a smoking product.
21 Do you see that?
22 A Sure.
23 Q That's the exact opposite of the
XA
24 cigarette?
25 A Well, as you pointed out, the XA
doesn't work
05728
1 unless you add nitrate.
2 Q So this is the exact opposite?
3 A Yes.
4 Q He goes on to say, and I believe
we should
5 give serious thought to the ramifications
of
6 introducing such a product.
7 A Yes.
8 Q You did not know that back in
1978 when you
9 were going to go to the FTC, did you?
10 A Did not know --
11 Q You did not know -- strike the
question.
12 Back in 1978, when you were

going to go to
13 the FTC, were you aware of any Liggett
scientist that
14 was suggesting that it is crazy to
increase nitrates,
15 we should be going the other direction?
16 A No, I certainly wasn't aware of
it.
17 Q Now, we saw in that one memo --
so the jury
18 understands, the problem with adding
nitrates doesn't
19 stop with NO, oxides of nitrogen. Adding
nitrates
20 also increases nitrogen dioxide, is that
correct?
21 A Yes.
22 Q And you were aware when you were
-- when you
23 were working on this project, you were
aware that
24 nitrogen dioxide is very toxic and can
cause cancer?
25 A Probably.
05729
1 Q Well, let me show you a document,
then.
2 A You said I was aware.
3 Q I am asking you if you were aware
and you
4 said probably.
5 A I said probably. But I don't
recall a
6 specific discussion about nitrogen
dioxide.
7 Q You don't remember that. Didn't
you expect
8 or want Liggett to at least tell you about
all the
9 potential dangers of this product that you
were going
10 to go talk to the FTC about?
11 A I did expect them to have a
discussion with
12 me. And I thought that disclosure of the
nitrates
13 that were being added in the process
would lead to
14 that debate.
15 And you are asking to a
specificity level
16 that it would be unfair for me to suggest
that I sat
17 around with these guys and talked about
nitrogen
18 dioxide, as opposed to nitric oxide, or
any of the
19 other compounds of nitrogen. It was
just a general
20 discussion. When I say probably, there
was probably a
21 discussion of nitrogen dioxide, but I
don't really

22 have a recollection of that.

23 Q And I recognize that you were
taking

24 information that was given to you by your
client, but

25 as a lawyer you have an obligation
yourself to inquire

05730

1 to underlying information that your client
may not be

2 providing you, is that fair to say?

3 A Sure. To the extent that I
understand that

4 the problem, yes, that's right.

5 Q Before you went to the Federal
Trade

6 Commission and tried to become an advocate
for this

7 product, did you think you had an obligation
to look

8 into the science, at least to understand
what the

9 dangers are?

10 A Counsel. Advocate for the product
is unfair.

11 What I have tried to say in a thousand
different ways,

12 I was an advocate for them looking carefully
at what

13 was presented here, so that we could have a
discussion

14 about whether or not the FTC would object
to this

15 product going to market. Big difference.

16 I wasn't an advocate for the
product. I was

17 an advocate for a process. A process in
which we vet

18 this subject fully and see whether or not
it can go to

19 market. And that's why, when you read
these memos, I

20 hope you see, when I say to someone who has
already

21 got a planned promotional campaign, and
when I say to

22 executives who expect the product on the
market in

23 January of '79, that you can't do it, that
I am not an

24 advocate for the product, I am an advocate
for the

25 process. And there is a big difference to
me.

05731

1 Q As far as the product is
concerned, Liggett

2 recognizing that the nitrates are a huge
problem, they

3 tried to solve the problem by creating a
new filter,

4 is that correct?

5 A That's my understanding.

6 Q But you learned that filters only
can do so
7 much after you increase nitrates that much,
is that
8 correct?
9 A Well, that's right, I think.
10 Q Okay. Let me show you a document
that is in
11 evidence. I will hand to you what is marked
as State
12 Exhibit 6056 in evidence. I will show it to
the jury.
13 This is a Liggett memo, is that
correct, sir?
14 A Yes.
15 Q And I think the date is twelve --
December 8,
16 1975, sir.
17 Do you see that?
18 A Yes.
19 Q Again, this is to Dr. Mold by
scientist Vello
20 Norman.
21 Do you see that?
22 A Yes.
23 Q I am going to just show you -- the
subject
24 matter, at least on the first page, he is
talking
25 about what kind of compounds can we
selectively
05732
1 substantially eliminate from smoke in light
of what we
2 know about smoke chemistry and filtration
mechanics?
3 Do you see that?
4 A Yes.
5 Q I want to turn to the next page.
I want to
6 talk about these -- the two products that
we have been
7 talking about, nitric oxide -- the nitric
oxide and
8 oxides of nitrogen are the same, do you
understand
9 that?
10 A I'm sorry. I didn't hear your
question.
11 Q You understand that oxides of
nitrogen, NO,
12 is the same as nitrous oxide?
13 A Yes.
14 Q I want to look in here -- it
says, if we are
15 talking about the oxides of nitrogen, says
relatively
16 moderate concentration in smoke, however
the
17 concentration is a function of the nitrate
level in
18 the blend. We have other reasons for
wanting to

19 elevate the blend nitrate content.

20 And he cites the Biores test

project, do you

21 see that?

22 A Yes.

23 Q That was another name for the XA

project,

24 wasn't it?

25 A Yes.

05733

1 Q He says, and hence, NO

removal assumes

2 considerable importance. We have

some selective

3 filters for NO, however none are more

than fifty

4 percent efficient at present.

5 A Yes.

6 Q And it goes on to talk about

nitrogen

7 dioxide, which is also created by these

nitrites, is

8 that correct?

9 A Right.

10 Q Nitrogen dioxide, he says, low

concentration

11 in smoke, and it is difficult to assess

analytically

12 just how much is there because of its very

reactive

13 nature. It could be a problem in high

nitrate blends.

14 Recognized as a very toxic material and has

15 implications in carcinogenicity.

16 Do you see that?

17 A Yes.

18 Q Little work has been done on it,

apart from

19 its co-occurrence with nitrogen, NO. NO is

converted

20 slowly to NO₂ in air. This is potentially

a fruitful

21 area for work.

22 Now, my question is, when you

began to work

23 on this project, the XA project, were you -

- did

24 anyone at Liggett discuss with you their

view as to

25 whether they would be able to develop an

effective and

05734

1 safe filter, that whatever removed or
reduced the

2 nitrates down to, let's say, an
insignificant level in

3 the smoke?

4 A No, I can't answer the question
quite that

5 way because there was a lot of discussion
about the

6 fact that they could reduce the level of
nitrates, but

7 it would only be to a level comparable to
the leading
8 brands. And what this does -- and, again,
I hadn't
9 seen this document, I mean, in years. I
don't know --
10 it says my name on it. I guess I saw it in
September.
11 But what I thought at the time, and
you think
12 about these subjects twenty years later --
and I use
13 this illustratively. What I was always
impressed with
14 was when you went through this list of
contents, and I
15 didn't remember the nitrogen dioxide
discussion
16 specifically, but I always remember
the hydrogen
17 sulfide discussion. Because hydrogen
sulfide was
18 described as something that really hadn't
been a lot
19 of focus on but that it was incredibly
toxic.
20 So you -- when you look at what
happened
21 with the XA project, what happened to
hydrogen
22 sulfide, it is so much lower than the low
tar
23 cigarettes in the top ten brands, it was
the sort of
24 thing in my mind always sort of underscores
why
25 everybody was excited. Nobody knew exactly
what the
05735
1 cigarette did or didn't do.
2 It probably did some things that
were poorer
3 than the conventional brands. It reduced
tumors,
4 arguably, but then you got to something
like this on
5 hydrogen sulfide and it looked like it was
a
6 breakthrough product. And that's why I was
an
7 advocate for the process. Let's see what
it does and
8 doesn't do.
9 And when you take things like this
-- and I
10 am trying to agree with you. Obviously
there are
11 problems with the XA, or there were
potential problems
12 that had to be addressed. And to answer
your question
13 specifically, the filter technology was
only described

14 as something that would get it down to
barely
15 acceptable levels. And they were shooting
to get it
16 lower than a Marlboro.
17 Q Well, in fact when Liggett decided
to find a
18 filter that could reduce the nitrates down
to even
19 that level, they had to use another toxic
compound
20 called cobalt in the filter, didn't they?
21 A I think at one time they played
with that,
22 yes.
23 Q Let's talk about that. So
Liggett, in order
24 to get the nitrate level down -- by the
way -- strike
25 that question.
05736

1 So the jury understands, Liggett
never had
2 actually developed an XA cigarette, it
kept
3 experimenting with different formulations
of what the
4 cigarette might look like some day, is
that correct?
5 A Well, the cigarettes that I
described, I
6 guess yesterday, that I smoked, I thought
were what
7 they had finally decided upon. These are
the ones
8 that I couldn't distinguish between a
Marlboro. The
9 reason they use Marlboro, it wasn't to
pick on Philip
10 Morris, it was because it was the number
one
11 cigarette. The fact is I thought that was
the final
12 production cigarette. I thought at one
point they had
13 produced a million or so of those
cigarettes, so that
14 I would have those cigarettes to give to
the trade
15 commission.
16 They expected that some of the
people who
17 smoked at the trade commission would
actually try the
18 cigarette. So in addition to this booklet,
I would
19 bring them a carton of cigarettes or two.
I thought
20 they had -- counsel, I thought they had a
final
21 cigarette.
22 Q Wasn't Liggett still fooling
around with the

23 formula in 1984?

24 MR. FERGUSON: Objection.
Foundation.

25 THE WITNESS: I don't know the
answer to
05737

1 that.

2 THE COURT: Sustained.

3 BY MR. WEBB:

4 Q Let me stick with the filter for
a minute.

5 If I need to show you some documents, I
will. I want

6 to see what you remember.

7 Do you recall when you were
working on this

8 XA project that when Liggett decided to
develop a

9 filter that would try to address the
nitrate problem,

10 that the filter it eventually developed
had cobalt in

11 it?

12 A I remember a discussion of that.

13 Q And do you remember a discussion
that cobalt

14 itself is another toxic substance?

15 A Yes, I remember that.

16 Q In fact, do you remember that the
Liggett

17 patent, the patent we looked at where
Liggett had

18 developed the XA technology, the patent
stated on its

19 face that cobalt was too toxic and not
recommended to

20 be used in the XA technology?

21 A I remember that.

22 Q Did it strike you as odd that
Liggett, in

23 trying to solve the nitrate problem, then
added cobalt

24 into the product which the patent said was
too toxic?

25 A Well, it didn't strike me as odd,
because
05738

1 remember the patent is based on the
addition of

2 another toxic metal, and that is palladium.
In other

3 words, if it takes that kind of catalytic
activity in

4 order to achieve a result, it didn't
surprise me. But

5 it underscored, once more, the importance
of this

6 inhalation testing and any other testing
that it might

7 have been engulfed in.

8 Q By the way, all that material you
were going

9 to take to the FTC, does that -- did

Liggett do any
10 testing of the cobalt filter, do you know?
11 A No. And I don't know the answer
to the
12 Southwestern Institute's final report. I
had been
13 told -- I can tell you, I had been told at
the time
14 that the final inhalation studies would
give us trace
15 metals or trace materials on all of these -
- on all of
16 these issues, palladium, cobalt, et cetera.
I don't
17 know whether or not they in fact did. That
report I
18 remember being -- I remember being shown
that report
19 sometime well after I was not involved.
Maybe '81 or
20 '82. But I don't remember that.
21 MR.
WEBB: I will stop.
22 THE
COURT: We will take a
break. We will
23 see you at 1:30.
24
(Luncheon
recess.)
25
05739
1
(Afternoon
session.)
2 (Jury
not present.)
3 MR. FERGUSON: Your Honor, we
mostly wanted
4 to give you a heads up. Mr. Meyer is
available
5 through the rest of today. He is a board
member of
6 the Hockey Hall of Fame. He has meetings
he is
7 irrevocably committed to Monday and
Tuesday. Mr. Webb
8 doesn't have an objection if Mr. Meyer
needs to be
9 recalled sometime after Monday and
Tuesday, we can
10 work that out.
11 I wanted to let the Court know
that. And I
12 was hoping we could get some kind of
indication of the
13 likely time the rest of this would take.
14 MR. WEBB: I will do everything I
can to
15 finish this afternoon. I just sat down
over the lunch
16 hour and went over the areas I have to go
through. I

17 still have a fair amount to go. I told
Mr. Ferguson
18 before the break I was roughly estimating
an hour and
19 a half. I may be off. It may be two
hours. I have
20 taken areas out.
21 I told Mr. Ferguson if we don't
finish today
22 with the complete examination, I
understand the
23 courtesy the witness, Mr. Meyer, needs,
and bringing
24 him back on Wednesday or Thursday of next
week, I can
25 work that out with Mr. Ferguson.
05740

1 MR. FERGUSON: I haven't asked
Mr. Meyer his
2 availability on those dates. I would like
to get him
3 finished today, if we possibly can.
4 THE COURT: Let's find out if
there is an
5 issue. It sounds like there is a
significant
6 possibility that we won't get him finished
today.
7 What is your availability next
week?

8 THE WITNESS: I will be in
Toronto, your
9 Honor. I think it is fair to say -- I
know that
10 Wednesday doesn't work. My question
would be
11 Thursday. And I can look at that. I am
supposed to
12 be in Philadelphia and New York. If I
have to come
13 back, I will make arrangements to come
back at your
14 direction. And Thursday is a possibility,
perhaps the
15 next week. I think the next week may be
Thanksgiving
16 week, and that may be a problem. If I have
to be on
17 cross for that long, I will do what I can
to give them
18 some alternative dates.

19 THE COURT: One day is more than
enough.
20 What's your position?
21 MR. WEBB: I was going to say, the
thought
22 struck me, if we get started and things go
well and we
23 are down to -- we have to go like an extra
half hour
24 today to finish him, if you your Honor
wants to do
25 that, and the State wants to, I am not

opposed to
05741

1 that. That may not be acceptable to the jury.

2 THE COURT: We will go a half hour. What you

3 have outlined may require more than that.

4 What is the total expected cross-examination,

5 if any, of the other defendants?

6 MR. McCORMICK: For my clients I would

7 expect -- obviously, I will wait and see what Mr. Webb

8 does and where we are at the end of his examination to

9 see what we will do. Under the most expansive

10 interpretation it would be a half hour.

And I believe

11 actually it will be considerably less.

12 THE COURT: Others?

13 MR. KACZYNSKI: Your Honor, as of right now

14 R.J. Reynolds doesn't have any questions.

15 MR. SCHIFFERMAN: None from

Lorillard at this

16 time.

17 THE COURT: Okay. Let's get started. And I

18 hope we can conclude this afternoon.

19 We do have the issue of the scope of the

20 cross as related to the warnings for the 21 advertisement. You suggested that we do that at the

22 afternoon break, but here we are.

23 If you are ready to go -- I

understand there

24 won't be more briefing.

25 MR. McDERMOTT: The only point I would make,

05742

1 your Honor, that is the jury's time. We can do it

2 when the jury is on break, if that is satisfactory.

3 We can do it now if you like.

4 THE COURT: It is, but we have other people,

5 including the reporter. I don't know if there is a

6 backup here for the reporter. I am content to wait

7 for the break and see if we can focus it and maybe

8 take a shorter break.

9 Let's go ahead and get the jury working.

10 (Jury present.)

11 THE COURT: Please continue.

12 MR. WEBB: Thank you, your Honor.

13 BY MR. WEBB:
14 Q Mr. Meyer, I want to pick up
where we left
15 off right before the lunch break. I was
asking you
16 about the issue that Liggett, in order to
try to deal
17 with this nitrates problem, we had
established that
18 you recalled Liggett had developed a filter
that used
19 cobalt, is that correct?
20 A Yes.
21 Q In connection with you going to the
Federal
22 Trade Commission and doing work for Liggett
in
23 connection with the Federal Trade
Commission, did any
24 scientist, or anyone from Liggett ever tell
you that
25 Liggett at one point in time had determined
that
05743
1 cobalt was too toxic to be used in a
cigarette
2 product?
3 A I recall some discussion of that.
I mean,
4 how specific I can't say.
5 Q When you learned this issue --
strike that
6 question.
7 Did you also learn that because
cobalt was
8 toxic, that Liggett was concerned and
worried that the
9 cobalt would then be transferred into the
smoke that
10 would be inhaled into human lungs if they
smoked the
11 product?
12 A I can't answer that question. That
is more
13 specific than my recollection.
14 Q Well, first of all -- I am going to
show you
15 a document so we can discuss the issue. I
am going to
16 now give you what is in evidence as State
Exhibit
17 6057. It is a long document. And I only
want to talk
18 about one page.
19 Just so the jury sees what I have
shown you,
20 this is a document, which I think I showed
you
21 earlier, it is a memo to Dr. Mold by these
two other
22 scientists at Liggett, dated April 1, 1975.
And it is
23 about the agenda for discussion of plans for

marketing

24 a biologically approveable cigarette. And
we read off

25 the first paragraph this morning.

05744

1 Do you remember that?

2 A Yes.

3 Q Now, the page I want to go to that
talks

4 about the filter is page 6. If you will go
to page 6

5 of this document that is marked as State
Exhibit 6057.

6 Let's see what the Liggett scientists say
about this

7 filter.

8 It says here, the filter, which we
will

9 expect to use to trap oxides of nitrogen,
will contain

10 salcomine. Salcomine is a complex of cobalt
-- and I

11 won't attempt that word, but you see it
there?

12 A Yes.

13 Q And may itself give us a problem.
Since

14 salcomine is a powder, some transfer of
salcomine into

15 the smoke is likely, according to these
scientists.

16 Do you see that?

17 A Yes.

18 Q We cannot at this time provide
data for the

19 transfer of salcomine or cobalt into the
smoke.

20 Do you see that?

21 A Yes.

22 Q Now, do you remember at the time
you were

23 going to go talk to the FTC, do you
remember being

24 told by Liggett that another problem that
we have to

25 deal with and we ought to tell people
about is that if

05745

1 the cobalt seeps into the smoke, and then
into the

2 humans lungs, that that could be another
health

3 problem.

4 Did you have any discussions
about that?

5 A I actually thought we talked
about that this

6 morning. My only recollection is that
there was going

7 to be a report -- an eventual report from
the

8 Southwest Institute on whether or not
trace

9 indications of cobalt showed up in the 24-month

10 inhalation study. There was some discussion, but I

11 don't have any more recollection than that. That

12 problem was going to either be addressed positively or

13 negatively in the Southwest Institute report.

14 Q Well, the report that Liggett gave you to

15 present to the FTC, the collage of documents that are

16 part of State Exhibit 4061. Is there anywhere in all

17 these documents -- did Liggett disclose in these

18 documents at least a problem?

19 A No, I don't think so.

20 Q Do you think that is something the Federal

21 Trade Commission or the public health community should

22 know about as far as vetting and discussing the

23 dangers of this product?

24 A Yes. The answer is yes.

25 Q I want to come to the end of the nitrate

05746

1 story. Am I correct, sir -- did you eventually learn

2 that over the next several years -- strike the

3 question.

4 Sometime in 1979, I believe, you testified

5 Mr. Greer told you not to go to the FTC at that time?

6 A In a formal way, yes.

7 Q You said he called you on the telephone?

8 A He told me not to go formally.

9 Q Not to go formally to the FTC?

10 A Right.

11 Q Because you already had some informal

12 contacts?

13 A Yes.

14 Q Now, my question is, after that you continued

15 to work for Liggett up until 1986?

16 A Sometime, '86, early '87 perhaps.

17 Q Did you learn and have discussions with

18 Liggett personnel and learn that Liggett, after they

19 told you not to go to the FTC, that Liggett continued

20 to test different versions of the XA cigarette and

21 still could not solve the nitrate problem?

22 A No. The only discussions I had
about the XA
23 project that I recall were with Mr. Greer
before his
24 death. I don't recall that.
25 Q Let me show you a document that
is in
05747
1 evidence. It is -- it is Defense Exhibit
AS001299.
2 I am going to hand it to you. I don't
think you have
3 seen this one before, Mr. Meyer. And I am
going to
4 put this on the screen for the jury.
5 This document is dated May 4th,
1984, is that
6 correct?
7 A Yes.
8 Q Now, if we look at this document,
it is a
9 document to a Mr. Montague from, I believe
it is Dr.
10 Hilliard and Dr. Wallack.
11 Do you see that?
12 A Yes.
13 Q Were those scientists at
Liggett?
14 A Well, we saw Dr. Wallack's name
on another
15 memorandum. I don't know Montague and I
don't know
16 Hilliard.
17 Q In any event -- this is 1984.
They are
18 talking in this memo about a
timetable, status on
19 project XA. The front page I am
talking about.
20 A Right.
21 Q Do you see that?
22 A Right.
23 Q Now, what I want to call to
your attention
24 is, in this document here they start
right in the
25 first paragraph, under Product
Development, in May of
05748
1 1984 Liggett is saying the following.
Cigarettes in
2 the seven to eight milligram tar range,
and then they
3 put in parentheses 85 and 99 mm, have been
developed
4 that deliver acceptable taste properties.
However,
5 the oxides of nitrogen, NO, in smoke are
quite high.
6 In the case of the 85 mm prototype -- now,
a prototype
7 is simply an experimental cigarette, is
that correct,

8 sir?
9 A Yes.
10 Q In the 85 prototype, NO, oxides of
nitrogen,
11 is 61.5 percent higher than the average
delivery of
12 eleven commercial products, and in the 99
mill --
13 whatever, mm, prototypes, nitrogen of oxide
is 107.22
14 higher than the average delivery of seven
commercial
15 products.
16 Delivery of nitrosamines and PCAHs
are not
17 presently available.
18 Now, do you see that, sir?
19 A Yes.
20 Q Now, does that indicate to you
that even as
21 of 1984 it appears that Liggett has still
not solved
22 the problem of the nitrates being too high,
creating
23 too many oxides of nitrogen in the
cigarette smoke?
24 A No, that is not what it indicates
to me. It
25 indicates to me that the situation is
essentially the
05749
1 same in '84 as it was back in '78 or so.
And that is
2 -- and I believe this to be the case, that
the nitrous
3 oxide or the nitrates that show up in the
XA project
4 or the new cigarette are about the same
as Marlboro
5 and some others, but still much higher
than the more
6 popular brands or lower-tar brands,
nothing is more
7 popular than Marlboro.
8 So what it shows me is they
haven't changed
9 anything at that stage. And honestly, that
is as far
10 as I can go in trying to be helpful,
because I was not
11 involved in these discussions. I don't
know what was
12 going on with this development. I don't
know whether
13 this was litigation related, I don't know
whether -- I
14 just don't know. I wasn't involved.
15 Q Okay. At least, these scientists
are saying,
16 at least in their judgment the oxides of
nitrogen in
17 smoke are quite high?
18 MR. FERGUSON: Asked and answered.

No
19 foundation.
20 THE COURT: Go ahead and complete
your
21 question.
22 BY MR. WEBB:
23 Q Sir, I am asking, these scientists
at least
24 were of the view that the oxides in these
two test
25 prototype cigarettes they say are quite
high, on the
05750
1 face of this document?
2 MR. FERGUSON: Same objection.
3 THE COURT: Overruled.
4 THE WITNESS: I think, Counsel,
that I would
5 have said they were quite high -- I believe
I said
6 they were quite high in some of my informal
7 discussions. And I think this chart on
nitrous oxide
8 says they are quite high on page LDM89. So
I don't
9 know whether or not quite high is different
than it is
10 now, in '78.
11 BY MR. WEBB:
12 Q This morning you agreed with me
that Liggett
13 needed to solve the nitrate problem before
this
14 product went into the marketplace, is that
correct?
15 A That's right. When they added
the nitrates
16 they had to do something to reduce
nitrates down to
17 the level of this table or they never
would have
18 gotten to market, that's right. I
thought, in
19 fairness, that they had solved that
problem to an
20 acceptable level, because after all,
they got them
21 below a Marlboro.
22 But I don't know whether now this
quite high
23 reference in '84 means that it is either
higher or
24 lower. It probably means it is still as
high as in
25 1978. It would be misleading to say that I
didn't
05751
1 think they had solved the nitrates problem,
because I
2 thought they had by the filter technology
and the way
3 in which they had processed the tobacco
back in '78.

4 Q Just so I understand what you are
saying, are
5 you saying even if this cigarette is
delivering oxides
6 of nitrogen at 107 percent higher than say
seven other
7 commercial products, that this is a safer
cigarette?
8 A I am saying if this chart is
correct, the one
9 we looked at this morning, LGM89, and the
nitrous
10 oxide is really about the level of the top
ten brands,
11 higher than some, lower than some, and
higher than the
12 low-tar brands -- and it looks to me like
if you took
13 the top cigarettes, 107 percent is about
the right
14 measurement here, that because of the other
potential
15 benefits of this process, that this is
something worth
16 considering.
17 And I think those numbers are
probably the
18 same numbers you would get if you took the
seven
19 brands that are referenced there and
referenced them
20 as in here. There is no question that the
nitrates
21 were on the high side, but they were still
below the
22 number one cigarette. That's all I am
saying.
23 Q Actually, does it say here that it
is below
24 the number one cigarette?
25 MR. FERGUSON: Objection.
Argumentative.
05752

1 THE COURT: Overruled.
2 THE WITNESS: I know that in stuff
that I saw
3 at the time Marlboro was higher. And
somewhere a
4 document exists Marlboro is higher in
nitrates, I
5 believe, or nitric oxide, than the XA
cigarette. That
6 was also somewhat satisfying to me.
7 BY MR. WEBB:
8 Q Can you identify that document for
us?
9 A Can I identify?
10 Q Yes.
11 A No, it is a document I saw in
1978.
12 Q You have not seen it recently in
what the
13 State has shown you?

14 A I don't recall -- I don't recall -
- I recall
15 seeing the Southwest Institute study, the
final report
16 in '81. That, of course, is not in here.
But I don't
17 think that has anything to do with
nitrates. I
18 noticed that that was the palladium
residual issue. I
19 don't recall whether or not I have seen it
in the last
20 -- since September or not. I know that I
saw it in
21 '78.
22 Q Can you identify -- who prepared
the
23 document?
24 A It is a document that purports to
be a
25 Liggett document with these names on the
chart
05753
1 unmasked. In other words, those top
brands there, I
2 saw a document that has the brands'
names, the
3 various, Winston, Marlboro, et cetera,
somewhere.
4 Q But you can't identify --
5 A I don't have it. And, you know,
I haven't
6 seen it today, and I certainly haven't
seen it in my
7 formal testimony.
8 Q And have you -- strike the
question.
9 Let's go on. As far as these
are too high
10 and whether they solve the problem, let's
see what
11 they say they want to do. This is now
1984. It says
12 here, you see where it says we plan to make
another
13 sample run within the next two weeks?
14 A Yeah, I see that.
15 Q Do you see where I am reading? We
plan to
16 make another sample run within the next two
weeks.
17 The purposes for this run are, refine
application of
18 catalyst and magnesium nitrate, number 2,
reduce the
19 delivery of NO in smoke.
20 Do you see that?
21 A I see that.
22 Q Does it appear to you at least by
looking at
23 this document that Liggett still in 1984
was
24 struggling with this nitrate problem trying

to find a
25 way to reduce the oxides of nitrogen?
05754
1 A I can only answer to the way I
did, Counsel.
2 I would like to give you the shortest
answers as
3 possible because of my time schedule, but
what I
4 recall is nothing about this memo because I
didn't see
5 it at the time. I don't know what they
were doing or
6 whether it was litigation related. My only
discussion
7 in this time frame was with Greer with the
cigarette.
8 And yes, based on this document, on its
face it looks
9 like something is still going on in terms
of product
10 development.
11 Q Thank you. Let me move away from
the
12 technology of the XA cigarette and move on
to a
13 different subject. As far as what was
actually going
14 on in Liggett as far as developing this
product --
15 setting aside this technology for a
moment -- do you
16 agree that Liggett's own internal severe
financial
17 problems in the late 1970s was
interfering with
18 Liggett's ability to devote resources to
developing
19 the XA cigarette technology?
20 A Yes.
21 Q And so the jury understands, and
maybe we can
22 go through this pretty quickly, am I right
in the late
23 1970s, while you were working on the XA
project,
24 Liggett was experiencing severe
financial problems
25 throughout that period, is that
correct, sir?
05755
1 A Yes.
2 Q And the financial condition
of Liggett was so
3 bad as a company at that time it was
on the verge of
4 being sold at a very low bargain
basement price to
5 various interested investors, is
that correct?
6 A That's what I thought, yes.
7 Q And you agree, do you not,
that the key to

8 the success of the XA technology was
the effort that

9 would be put into it by the
scientists in the research
10 and development problem?

11 A Yes.

12 Q And, however, you were
aware in the 1970s

13 that Liggett's own research and
development budget was

14 being cut because of the financial
problems, is that

15 correct?

16 A That's my understanding.

17 Q And you were aware that in
the late 1970s --

18 late 1970s when you were involved
with XA, that

19 because of Liggett's financial
problems Liggett was

20 reluctant to finance the type of
additional

21 independent laboratory testing that
would need to be

22 done in order to confirm the mouse
skin painting tests

23 done by A. D. Little?

24 A I would say yes.

25 Q And Liggett -- you were
aware and Liggett was

05756

1 aware, to your knowledge, that the
XA cigarette to

2 have credibility, scientific
credibility, in order to

3 be accepted by the scientific
community as you vet

4 this in the world out there, that
Liggett was going to

5 have to go out and hire another
independent laboratory

6 to confirm the tests that were done
by A. D. Little,

7 is that correct?

8 A That was certainly a real
possibility, if we

9 were looking for ultimate
credibility.

10 Q Okay. I take it if you
were going to

11 ultimately market the product --
strike the question.

12 From what you told the
jury, if you as a

13 lawyer for Liggett were going to be
able to

14 successfully go out and talk to the
FTC and the

15 surgeon general and deal with what
would be a vetting

16 and probably a lot of resistance,
you were going to

17 need the best scientific case to

support your position

18 that you could get, wouldn't you?

19 A No question.

20 Q In fact, specifically, one example of

21 Liggett's financial problems impacting their ability

22 to develop this product was that you became aware in

23 the late 1970s that Liggett actually had meetings with

24 Dr. Gori, Gio Gori of the National Cancer Institute,

25 is that correct?

05757

1 A Yes.

2 Q And you became aware as the lawyer for

3 Liggett that Liggett wanted the National Cancer

4 Institute to do its own independent testing --

5 A True.

6 Q -- of XA to confirm the results that A. D.

7 Little had obtained in order to give the product

8 credibility, is that correct?

9 A There is no question that one of the benefits

10 might have been that. But it was really to include

11 the XA in some National Cancer Institute testing that

12 would have been very helpful in the debate, yes.

13 Q So that's what -- Liggett went to the NCI and

14 said, would you please test this product, is that

15 correct?

16 A Yes.

17 Q And the National Cancer Institute told

18 Liggett, we will test the product, but following our

19 normal procedure we will expect you to pay the costs

20 for us to test the product, is that correct?

21 A I don't know if that's correct. I know that

22 Liggett did not feel that it could pay -- I recall it

23 being about a million dollars, could not pay what was

24 being asked by Gori for the XA project and whatever

25 testing that was being proposed.

05758

1 Q You found out whatever the cost was the NCI,

2 the National Cancer Institute, told

Liggett, it will

3 cost about a million dollars to do this testing, and

4 Liggett refused to agree to that because it couldn't

5 -- or did not want to pay the million dollars?

6 A They did not pay the million, they refused to

7 pay the million. And obviously, when I heard about it

8 I was not happy with it. It was explained to me, it

9 was more a question of not being prepared to carry it

10 forward formally than the million dollars. The

11 million dollars doesn't -- it is not a lot of money to

12 a company that has already spent 13 or 15 or whatever

13 it was. It was explained to me at the time that it

14 was a part of the decision -- the request from Gori

15 came before they were really ready to go forward more

16 formally with the project. It was also the money, but

17 it was also because of this other consideration.

18 Q And you said you were a little upset about

19 this because you recognized if Liggett was serious

20 about putting this product into the market and having

21 people like you act as their representatives to

22 convince people that it is a good product, having the

23 National Cancer Institute test it and find out whether

24 in fact these mouse skin painting tests were correct

25 or not would be an important thing, is that correct?

05759

1 A No question.

2 Q And Liggett refused to do that?

3 A Liggett refused at that time to pay the

4 million dollars. And I knew that that would be an

5 issue that we would have to deal with as the dialogue

6 went forward at the trade commission. And we would

7 have to revisit it.

8 Q But it never happened?

9 A It never happened.

10 Q And there is no one else to blame but Liggett

11 for that, is there?
12 MR. FERGUSON: Objection.
Argumentative.
13 THE COURT: Sustained.
14 BY MR. WEBB:
15 Q Am I correct, sir, as far as this
XA
16 palladium cigarette, that Liggett because
of its
17 financial problems, actually made a
decision in 1977
18 to sell off its palladium inventory?
19 A I don't understand the question.
Let me
20 explain it this way. The project was
like a roller
21 coaster, it was up, it was down, it was
up, it was
22 down. I believe, and I haven't seen all the
documents
23 obviously, but I believe that the inventory
24 sale you are referencing was because of the
second
25 series of tests, and the results on that
second series
05760
1 of tests suggested that maybe the project
wasn't going
2 to be as successful as they had initially
hoped with
3 the first set, so they wanted to reduce the
inventory.
4 And then they changed their mind when the
third set
5 came in. So it was like a roller coaster.
6 Q So at some point in time Liggett
sold off its
7 palladium inventory?
8 A Yes.
9 Q At least to some extent?
10 A Yes.
11 Q And that was at the time of the
second MSP,
12 the mouse skin painting?
13 A That's my recollection.
14 Q Did Liggett sell off the palladium
because of
15 the financial problems or just decided to
get out of
16 the project?
17 A Starting with the first project,
the first
18 sets of tests, remember Liggett has gone
from a
19 company that is probably twenty percent of
the overall
20 market, with a company with two percent of
the market.
21 So this is a period of time, from
the very
22 first day I show up in Durham where the
company is not
23 a financial powerhouse.

24 Q In fact, that is my last point,
and I don't
25 want to get into it too far, but the reason
Liggett
05761

1 was having financial problems, was because
by its time

2 you get to the late 1970s Liggett's market
share had

3 dropped down to a level of somewhere around
two or

4 three percent of the market.

5 Is that fair to say?

6 A Fair to say.

7 Q By the way, when you were
representing

8 Liggett, you were of the opinion that the
competition

9 between the tobacco companies and the sale
of

10 cigarettes was very vigorous?

11 Is that fair to say?

12 A Yes.

13 Q You thought it was a very
competitive market?

14 A In the marketing of cigarettes, the
kinds of

15 positions that was going on in the brands of
the

16 various majors, there was intensive
competition.

17 Q As far as the story of what
happened with --

18 strike the question.

19 Now, another -- beyond financial
issues,

20 another major issue that was faced by
Liggett in the

21 late 1970s, beyond the financial issues,
as far as

22 developing the XA product was an issue
regarding the

23 concerns, the legal concerns about
marketing this

24 product held by your friend, Joe Greer,
who was the

25 general counsel of the company, is that
fair to say?

05762

1 A Yes.

2 Q And so we will tell the jury a
little bit

3 about that, is that Joe Greer, as you
said, was the

4 general counsel of Liggett, is that
correct?

5 A Yes.

6 Q That means he was the chief legal
officer of

7 that company?

8 A Yes.

9 Q He had the ultimate responsibility
and duty

10 to provide his client, Liggett, with his
best legal
11 judgment and advice, is that correct?
12 A Yes.
13 Q That's his job, is that correct?
14 A Yes.
15 Q You respected Joe Greer, is that
correct?
16 A Yes.
17 Q And you believed that he had sound
legal
18 judgment, did you not?
19 A Almost all the time.
20 Q You also believed he was honest,
did you not?
21 A Absolutely.
22 Q And he worked hard, in your
opinion, in
23 trying to give Liggett the best legal
advice he could,
24 is that correct?
25 A I believe that to be the case.
05763
1 Q Now, what developed is we get to
like 1978
2 and into 1979, Mr. Greer came to more and
more believe
3 that the regulatory environment in the
United States
4 was so hostile that it presented some
significant
5 legal risks if Liggett decided to market
this product?
6 Is that fair to say?
7 A Yes.
8 Q He was also concerned, besides the
FTC
9 problem, he was concerned about civil
lawsuits, is
10 that correct?
11 A Yes.
12 Q And in fact I think you have seen
this
13 document in your deposition, but at the
time -- strike
14 the question.
15 Am I correct that Mr. Greer became
16 particularly focused on these two major
legal concerns
17 in the fall of 1978, and he went out and
asked you to
18 become involved on the FTC side, and he
went to a New
19 York law firm and asked them to become
involved on the
20 civil liability side? Did I say that
correctly?
21 A The only thing I would quarrel
with, Webster
22 Sheffield had been litigation counsel in
the smoking
23 and health arena for years prior. I have
done some

24 work on other things.
25 He asked me to look at the FTC
issue, he
05764
1 asked Webster Sheffield to look at the
civil liability
2 issue.
3 Q I am now going to show you what is
in
4 evidence as State Exhibit 6038. I will
hand it to
5 you, sir, and I will put it on the screen
for the jury
6 so the jury can see what the legal concerns
were.
7 I see a date up there, 12/78. Do
you see
8 that, sir?
9 A Right.
10 Q That looks like December of 1978,
is that
11 correct?
12 A Yes.
13 Q And if we look here at what Mr.
Greer says --
14 and I won't try to take time to go through
this whole
15 document, but you have seen this before
recently?
16 A I saw this in my deposition.
17 Q Mr. Greer summarizes -- and that
is a two
18 page memo, is that correct?
19 A Yes.
20 Q Signed by Mr. Greer. Do you see
that?
21 A That's his signature, his
initials.
22 Q He sets forth in a pretty concise
way what he
23 sees the issue to be. I will read off what
he says.
24 He says, what legal risk does this company
take with
25 regard to governmental action and civil
litigation in
05765
1 the event it determines to manufacture,
advertise and
2 market the project XA cigarette, which
contains in its
3 tobacco blend a palladium catalyst and
added nitrates
4 which substantially reduce the biological
effect of
5 tar on mice as proven by the mice painting
tests that
6 reduced the number of carcinogenic tumors
appearing on
7 the catalyst blend painted mice as compared
to the
8 controls.
9 That's his question. Do you see

that?

10 A Yes.

11 Q And he first talks about the
Federal Trade

12 Commission. And we can read that off, but
he

13 basically describes the same legal risks
you have been

14 telling this jury about, is that correct?

15 A Yes.

16 Q That there was a significant legal
risk, that

17 the FTC would eventually not allow this
product to be

18 marketed, is that correct?

19 A That's correct.

20 Q He also goes on to talk about the
civil

21 litigation issue.

22 Do you see that?

23 A Yes.

24 Q He says, the second legal risk is
of even

25 greater significance than the first. Is
that of

05766

1 inciting and sustaining civil litigation
in the form

2 of cancer, emphysema, heart, et cetera,
actions based

3 upon this company's negligence or breach of
an implied

4 warranty or an express warranty.

5 Do you see that, sir?

6 A Yes, I do.

7 Q He goes on to describe -- he is
going to try

8 to reduce the risk? Do you see that?
That's what he

9 says, right?

10 A Yes.

11 Q And what I want to go through,
he says, in

12 order to attempt to reduce the second of
the above

13 primary risks, this company engaged the
services of

14 Donald J. Cohn, esquire of the law firm of
Webster and

15 Sheffield, to review all advertising
prepared for the

16 project XA cigarette brand. The first
meeting with

17 Mr. Cohn occurred on August 10, 1978, and
subsequent

18 meetings took place on August 29,
September 6 and 11,

19 1978.

20 Now, the reason I show you that
is that at

21 least it appears from this document that
Mr. Greer

22 believed that he actually believed Mr. Cohn

to work on
23 this particular project at this time in
August of
24 1978?
25 A I wouldn't quarrel with that. Don
Cohn was a
05767
1 fixture. The first day I showed up at
Liggett in
2 Durham Mr. Cohn was there. So whether he
retained him
3 for a specific undertaking, or it was an
additional
4 undertaking, no problem. I know that's
what happened
5 in that August, September time frame.
6 Q All I am bringing out, is
apparently Mr.
7 Greer was getting more focused to try to
get the best
8 advice he could from outside lawyers on how
to deal
9 with these problems?
10 A Right. And I think this document
was written
11 for either presentation to Mulligan or the
other
12 executives and the board. So it was
something that
13 was written, focused and typed -- because
board
14 members want to say, did you retain lawyers
to give
15 you some help on that? That's probably why
the
16 language is there. And it is a more formal
memo than
17 normal.
18 Q But do you agree that Mr. Cohn was
getting --
19 strike that.
20 Mr. Greer, to your recollection
was getting
21 more focused on trying to get the best
legal advice he
22 could on these problems as we get towards
the fall of
23 1978?
24 A No question.
25 Q And he goes on to say at the
conclusion --
05768
1 you have already testified about this, at
the
2 conclusion of the above advertisement
reviews, Mr.
3 Cohn, after some changes, accepted one
advertisement,
4 copy attached, which is not attached to the
copy we
5 have here, is it?
6 A No, it isn't.
7 Q But he says, as being possibly

defensible

8 with regard to civil cancer litigation?

9 A Right.

10 Q I won't repeat that. That is the
tombstone

11 ad that no one has found, but you told the
jury what

12 you remember it saying?

13 A With the Epic package on it. It
was a little

14 better than tombstone, it had the Epic
package.

15 Q I understand. And to go on to the
next page,

16 he continues to say with regard to the
first primary

17 risk -- that's the FTC, right?

18 A Yes.

19 Q He says this company on September
22nd, 1978

20 engaged the services of Lawrence G. Meyer,
Esquire of

21 the law firm of Patton, Boggs and Blow to
review the

22 possibility of approaching the FTC in an
informal

23 manner in order to present the
credibility of our

24 project XA cigarettes as a choice for
concerned

25 smokers.

05769

1 Do you see that?

2 A Yes.

3 Q Now, I'm not quarreling with the
date you

4 were retained, because it is of no
interest. He

5 apparently thought there some date
certain that he

6 asked you to work on this project?

7 A Yeah. Let's not quarrel about
that. I was

8 doing this before this time frame. I
think Joe was

9 writing this because it wanted to look like
the advice

10 he was given by Cohn and the advice he was
given by me

11 was current and pointed and precise for the
board.

12 Q I'm sorry. Did you actually start
working on

13 the XA product before the fall of 1978?

14 A Yes.

15 Q When did you start?

16 A Well, my recollection would have
been

17 sometime in '77, because I was aware sort
of

18 backhandedly about the fact that the first
tests were

19 great, the second tests were not so great -

- they were
20 still good in the sense that there was a
fifty percent
21 reduction that we talked about, but they
weren't as
22 good as the first tests, and then they sold
some
23 inventory, and then they didn't -- it was
just them on
24 and off again roller coaster. That's the
best thing I
25 can call it.

05770

1 Q I want to trace what happens over
the next

2 year or so with Mr. Greer as far as legal
concerns.

3 A Okay.

4 Q Now, am I correct that this
gentleman that we

5 just saw his name, Don Cohn of the
Sheffield Webster

6 firm, was somebody that Mr. Greer relied
upon pretty

7 heavily?

8 A Yes.

9 Q And would you agree that your
retention to

10 work on the XA project was for a more
specific and

11 narrow purpose than was the assignment of
the Webster

12 law firm, the Sheffield Webster law firm?

13 A Sure.

14 Q Well -- it's not that important.
Let me just

15 ask you this. Let me just go to the
meeting. Okay.

16 Tell me if I am correct, if I understand
your

17 testimony, at some point in time in 1979 --
strike the

18 question.

19 At some point in time you started
having

20 informal contacts with some
representatives of the

21 FTC, is that right?

22 A Yes.

23 Q You never had a formal meeting?

24 A No.

25 Q Then sometime in 1979 Mr. Greer
went to a

05771

1 meeting in New York that you were not
invited to, is

2 that correct?

3 A That's right.

4 Q And as a result of that meeting,
which a

5 number of people attended, Mr. Greer called
you up

6 after the meeting, if I understand your

testimony, and

7 told you Liggett had decided that you should not go

8 forward at this time with the FTC meeting?

9 A That's right.

10 Q Now, I want to try to help pinpoint the date

11 of that meeting. And I take it you don't remember the

12 exact date?

13 A I do not.

14 Q Before I do, though, let me just ask you,

15 this fellow -- did Don Cohn, the lawyer at the

16 Sheffield Webster firm, did Don Cohn ever tell you

17 that he was the one who recommended it to Liggett that

18 you should not meet with the FTC?

19 A I knew that the Webster Sheffield people felt

20 that it would be a real mistake to even go to the

21 point of delivering this document for the reasons we

22 discussed about the civil liability implications.

23 And I knew that Don Cohn was the strongest

24 proponent of that. And I'm sure that he told me --

25 Don never told me directly, I'm sure Joe told me at

05772

1 the time that Don felt very, very strongly that I

2 should not even take the next step.

3 Q That's my question. By the way, Don Cohn you

4 viewed to be a good lawyer, did you not?

5 A Absolutely.

6 Q You respected him, did you not?

7 A Yes.

8 Q You thought he was an honest lawyer?

9 A Yes.

10 Q You thought he worked very hard to give the

11 best legal advice he could to Liggett, is that fair to

12 say?

13 A Yes.

14 Q You are aware that Liggett had a lot of

15 confidence in his judgment, is that fair to say?

16 A Yes.

17 Q Was Don Cohn known as someone who could do a

18 good job in considering all the facts and

19 circumstances and rendering his best legal judgment?

20 A Well, I mean, I didn't know him
that well,
21 but, yes, he was a good lawyer. Joe liked
him and
22 respected him and he had been around
Liggett for
23 years.
24 Q And you never had any reason to
believe that
25 Mr. Cohn ever acted illegally in connection
with the
05773

1 advice he gave Liggett in connection with
the XA

2 product, did you?

3 A I have no reason to believe that.

4 Q Let me show you a document that
may establish

5 what date that you got the phone call. I
think you

6 have told us you don't know what time,
what part of

7 1979 that occurred in, or do you know?

8 A No, I don't know. I don't know.

9 Q Let me try to shortcut this. I
am going to

10 show you the following exhibit. I showed
this to you

11 this morning. This is exhibit -- State
Exhibit 6460,

12 which is the diary kept by Mr. Bowen Ross
of the XA

13 project.

14 Do you remember I showed you this
this

15 morning?

16 A Maybe yesterday.

17 Q Do you remember this morning -- I
will just

18 show you -- we looked at the document.
This is a

19 diary maintained --

20 A I thought it was yesterday or
this morning.

21 Q And Mr. Ferguson, I think I have
the right

22 page stamp numbers now based on the
exhibit I had. I

23 will be reading -- if I now have the
right one -- from

24 JDR 57. Maybe I should look at yours.

25 I am going to show you a page
in this
05774

1 document, and I represent this is Mr.
Ross's diary

2 that he kept in his own handwriting. So
we have to

3 struggle through his handwriting.

4 Do you recognize his
handwriting just by

5 working with him over the years?

6 A I recognize it now because I

had seen the

7 document before. I wouldn't recognize the
handwriting

8 if I had been given some blind test a
couple of months

9 ago. I know that now to be his
handwriting.

10 Q The page I have shown you is dated
October

11 5th, 1979. Do you see that you mean in the
corner?

12 A I do.

13 Q If we telescope in on this a
little bit --

14 you told us who you thought went to this
meeting even

15 though you were not invited, do you recall
that?

16 A Right.

17 Q Now, looking at the people, and I
am trying

18 to read their names -- how do you
pronounce this?

19 A Seidensticker.

20 Q Seidensticker, Greer,
Hooker, Hogland?

21 A Present Todd Mulligan.

22 Q And Mulligan is the CEO?

23 A Yes.

24 Q I am going to go down to an
entry down at the

25 bottom, and I will show you this
entry down here. It

05775

1 says, Larry, go to Clanton, member
of FTC, question

2 mark, Don says don't take risk?

3 A Right.

4 Q I believe you did mention
Mr. Clanton's name

5 in your direct examination. Was he
a commissioner or

6 connected to the FTC?

7 A Yes. And he is the fellow
that I described

8 that I hired when I worked for
Senator Griffin to come

9 to Washington. He then was on the
senate commerce

10 committee. He then was the
chairman. He had become a

11 commissioner at this time frame. If
you had to pick

12 one person on the commission I was
probably the

13 closest to, it would be Dave
Clanton.

14 And the thought was I would
start this

15 process formally with someone that
close to me. And

16 so that's why the focus on Clanton,
and you know, Don

17 says don't take risks. That's what happened.

18 Q And when Mr. Cohn gave that advice on that

19 date to his client, you have no reason to believe that

20 he was doing anything illegal or improper, do you?

21 A No, that was his view.

22 Q In fact, I think if we go to the next page --

23 this actually says page 2. You can see at the same

24 meeting, see at the top, page 2, 10/5/79.

25 A Yeah, sure.

05776

1 Q It says, Don says, something, license

2 available -- I don't know. Can you read that?

3 A I don't know what that word says. It says

4 something is available and see what happens.

5 Q But the point I want to show you, there is an

6 arrow, and that is not my asterisk, someone put that

7 there. Larry can't go to member of FTC.

8 A Right.

9 Q And I show you that because -- and apparently

10 that is consistent with your belief that it might have

11 been Mr. Cohn who told Mr. Greer that he did not think

12 you should go to the FTC?

13 A Well, I think it is probably unfair to put

14 that on Don. That's what Bowen Ross's notes say. I

15 don't think that Don was expressing a view that was

16 unique to Don. I mean, I think there was a real

17 political discussion. And others felt that we

18 shouldn't start this dialogue, others felt that we

19 should.

20 Q But at least that memo says Don is the one

21 that said it?

22 A There is no question that Bowen Ross's notes

23 suggest that he took away from that meeting that he

24 was at that Don was the most forceful proponent of

25 that.

05777

1 Q Now, what actually -- did you

learn at that

2 time -- now, we are in the fall of 1979
based -- does

3 that by the way -- do you believe that is
probably the

4 meeting?

5 A There is no question.

6 Q And it is after that meeting Mr.
Greer called

7 you?

8 A Oh, sometime. I mean, again, I am
not clear

9 that we didn't have a go -- a go/no go
decision a

10 couple of times during that year, because
I really

11 recall it was schizophrenic, it was on one
month, off

12 the next, and it was on the next month.

But I think

13 more finality to the project, as far as I
was

14 concerned, came after that meeting.

15 Q Okay. And what you found out,
did you not,

16 at that time -- in that same time period,
the fall of

17 1979, that your client Liggett had decided
to pursue

18 an alternative marketing strategy and
development

19 strategy for the XA cigarette, is that
correct?

20 A That's correct.

21 Q Tell the jury what happened.

What happened

22 was that Liggett started to explore the
possibility of

23 finding a foreign tobacco company that
would license

24 the XA technology from Liggett, and then
that foreign

25 company would finish the development and
then market

05778

1 the product in an overseas market; is that
correct?

2 A Well, I wasn't involved in that
effort

3 directly, and so I can only tell you what
my

4 understanding was, that Seidensticker and
Ross, Greer

5 was not involved directly, and I don't
know that

6 anyone else was, possibly Hooker, met with
three or

7 four foreign manufacturers or producers
in an effort

8 to do exactly what you said, namely,
license the XA

9 project and bring it initially to market
and thus

10 human testing in a foreign country.
11 Q In fact, did Mr. Greer tell you
in that same
12 meeting on October 5th, 1979, when Liggett
made the
13 decision to not have you go to the FTC, at
least right
14 then, that in that meeting these executives
made the
15 decision to go out and select foreign
tobacco
16 companies to contact to have them work with
Liggett to
17 develop this product?
18 A Yes.
19 Q I will show you what has been
marked as State
20 Exhibit 6430. This is in evidence. And I
think --
21 what happened here, is that this meeting -
- this memo
22 is actually dated October 18th. But it is
actually
23 referencing the meeting we just talked
about that took
24 place, the project meeting on October 5th.
25 Do you see that?
05779
1 A Um-hum.
2 Q And this memo describes what
happened in that
3 meeting. And, for example -- well, let's
go through
4 it.
5 Number one, these executives at
Liggett
6 decided to review with Englehart our
current agreement
7 due to expire on October 31, 1979 and
possible future
8 business relationships.
9 Do you see that?
10 A Um-hum. Yes.
11 Q Number 2, and this is the one I
want to call
12 your attention to, select and proceed to
contact one
13 or more foreign tobacco companies and
monopoly
14 countries which may have an interest in
exploiting
15 this invention with a view towards
negotiation of a
16 license.
17 Do you see that?
18 A Yes.
19 Q And then they also were talking
about
20 contacting a United States tobacco company
which may
21 be interested in a purchase of the asset on
a
22 nonexclusive license.

23 Do you see that?
24 A Yes.
25 Q And number 4, they were going to
continue to
05780
1 proceed with a blind and unidentified
consumer taste
2 test.
3 Do you see that?
4 A Yes.
5 Q So this idea of going to a foreign
country to
6 develop the XA cigarette, am I correct, the
-- the
7 strategy behind number 2 -- tell me if I am
correct.
8 Liggett's strategy was it the XA product
could be --
9 did well in the marketplace in a foreign
country that
10 might make it easier for Liggett to
overcome the
11 hostile regulatory environment in the
United States
12 and thereby build up some momentum for the
product
13 that would make it easier to introduce it
into the
14 United States.
15 Is that a fair statement?
16 A I wouldn't agree with that
exactly as you
17 have stated it. I believe -- my
observation would be
18 the reason why they decided to attempt to
select, and
19 they realized it would be very difficult,
because I
20 did have a number of discussions and I did
actually
21 bill some time on a couple of very
specific projects
22 with Bob Seidensticker relative to his
target -- his
23 target licensees.
24 And that was all I did. But the
fact is,
25 their view was that they would be
avoiding the civil
05781
1 liability issues that were of primary
concern to Mr.
2 Cohn by taking the product abroad in that
fashion.
3 And at the same time achieving the human
testing that
4 some, including me, thought would probably
have to
5 occur before we got the completely
favorable reaction
6 from the trade commission to this
particular process.
7 Q And did Mr. Ross or anyone ever

tell you that

8 the major reason why they wanted to go to a foreign

9 country was to build up momentum so they then could

10 introduce the product into the United States market?

11 A Well, even going back to some of the sort of

12 silly ideas we got from the public relations people,

13 that was an idea that had been invented long before

14 then.

15 Mr. Ross never said that to me. I had very

16 limited, as I tried to explain, dealings with Mr. Ross

17 after this project, sort of went a different

18 direction.

19 Q Let me show you another document that is in

20 evidence that is is marked as Exhibit WX001017, which

21 is -- I will just hand it -- here. Let me hand you a

22 copy of it. This document is in 1981. It is actually

23 addressed to a gentleman in South Africa.

24 Do you see that, sir?

25 A I do.

05782

1 Q And just to show who the letter is from, it

2 is from Bowen Ross, is that correct?

3 A Yes.

4 Q And I want to call your attention to a

5 certain paragraph in this letter. By the way, were

6 you aware that not only did Liggett go to Europe to

7 try to get another tobacco company to license the XA

8 technology, that Liggett actually went to South Africa

9 to see if they could find a company there that would

10 help them license the product?

11 A Well, at one point one of the shareholders of

12 Liggett, whose name escapes me right now, was South

13 African. I think they might have gone to South Africa

14 very early in this effort.

15 And indeed, one of the reasons that were

16 explained to me -- I can't recall this individual's

17 name, he was a man of some substance, and he was a

18 significant minority shareholder in
Liggett -- one of
19 the reasons he was interested in Liggett
was because
20 of this project, as I had been led to
believe.
21 So you have that right, they went
to South
22 Africa, but South Africa may have long
predated their
23 interest in going to Germany or
Switzerland or
24 wherever.
25 Q My point is, I am just looking at
this
05783
1 letter. Mr. Ross states, and I will read
the letter,
2 as I have previously mentioned to you, we
are
3 interested in cooperation with a company
domiciled in
4 another industrialized country who has
experience
5 either in tobacco or precious metals.
6 Our intent will be to test market
the project
7 XA cigarette in that or another selected
country and
8 proceed as the marketplace dictates.
9 And then the next sentence, our
ultimate goal
10 is to introduce the cigarette in the
United States
11 after a more receptive climate has been
generated.
12 Do you see that, sir?
13 A I do.
14 Q Now, does that refresh your
recollection that
15 what Liggett was trying to do was to find
a foreign
16 market where this product could be sold
in, and if the
17 product built up momentum, got some
credibility, that
18 then they could then introduce it into the
U.S.
19 marketplace and be able to deal with the -
- maybe get
20 a more receptive climate?
21 A That's certainly -- I mean, my
recollection
22 is that is certainly what Bowen Ross
hoped. Bowen
23 Ross was always a great supporter of the
project. And
24 I believed he hoped that eventually that
would happen.
25 My involvement, in a very limited
fashion, as
05784
1 I said, with Seidensticker, was they were

attempting

2 to license it abroad, and the barriers to coming back

3 to the United States were still real, that that was

4 unlikely. I know that was Ross's hope. But based on

5 the decisions that were made in '79, it was unlikely

6 they were coming back to the United States.

7 Q At least Mr. Ross says in 1981, that is the

8 goal of Liggett here?

9 A Counsel, he also says in this letter here, he

10 gives them the abstract that we talked about out of

11 the 12th International Cancer Conference. It says the

12 bulk of the information of the information will be

13 given to you after our review without explanation. It

14 may be overwhelming and lead to confusion. This is

15 what we are talking about, this is confusion.

16 Q What's your point? I missed your point.

17 A My point is, Mr. Ross is still dealing with

18 the same materials in '81 that we dealt with in '78.

19 And he is still hopeful. I think that he may be

20 behind the curve. You asked me my recollection. I

21 think he is behind the curve at that point.

22 Q When you say he is behind the curve, if I

23 understood from you, you don't actually know what

24 happened to the XA project after you stopped working

25 on it?

05785

1 A I just know what I spoke with Mr.

2 Seidensticker about.

3 Q Also I showed you a document earlier that in

4 1984 Liggett was still trying to develop the product

5 by testing it with the nitrates.

6 A Right. And it would be sheer speculation for

7 me to suggest what I think that might be. I didn't

8 know about that and I don't know about it.

9 THE COURT: Let's go ahead and take the

10 recess.

11 (At this time a short break was
taken.)
12 (Jury not present.)
13 MR. McDERMOTT: May I proceed,
your Honor?
14 THE COURT: Yes. Who will be
arguing?
15 MR. McDERMOTT: Bob McDermott.
16 We just wanted a clarification on
the Court's
17 ruling with respect to the issue of pre-
emption and
18 waiver. We understood the Court to issue a
very
19 narrow ruling which would permit Mr.
Ferguson on
20 redirect to raise questions with
respect to this
21 witness's testimony or possible advice with
respect to
22 advertisements for the Liggett palladium
cigarette,
23 the XA project. In conversation with Mr.
Ferguson he
24 seemed to think that the door was opened
more widely,
25 and that other company's products, other
times, other
05786

1 situations were also indicated in the
waiver ruling.

2 We simply want a clarification if the Court
indeed

3 limited the ruling to, as I have it here,
this product

4 and the scope of this witness's testimony.
We think

5 that is the limit for permissible redirect.

6 THE COURT: Let me hear from Mr.
Ferguson and

7 then you can respond.

8 MR. FERGUSON: I'm not sure what
they mean.

9 Maybe this will clarify, but I don't intend
to ask Mr.

10 Meyer whether in his opinion manufacturers
of any

11 other product should have made any
particular

12 advertisement one way or another.

13 MR. McDERMOTT: Or additional
warnings or --

14 MR. FERGUSON: I might want to ask
him if

15 Marlboro was really higher in nitrous
oxides, maybe it

16 should have made some disclosures, but I
don't want to

17 ask him about advertisements or warnings.

18 MR. McDERMOTT: It seems to me,
your Honor,

19 Mr. Meyer's testimony is given in
connection with an

20 attempt to make what might be viewed as an
implicit
21 health or safety claim. And his advice was
predicated
22 upon his understanding of the FTC
substantiation
23 doctrine. It did not involve such things
as normal
24 advertising requirements or the scope of
pre-emption
25 or the impact of the warning label and the
doctrine of
05787

1 pre-emption at all that dealt with the FTC
doctrine of

2 substantiation when you were making a
specific claim.

3 And so it seems to me that is what Mr. Webb
was

4 exploring on cross-examination, his advice,
given what

5 Liggett wanted to do with respect to the
mouse skin

6 painting claims and the implications of
that, and

7 should be the limit of the redirect
examination.

8 MR. FERGUSON: That is a pretty
wide breadth

9 description of this advertisement.

10 MR. McDERMOTT: Again, your
Honor, it is in

11 the context of a specific product and a
claim with

12 respect to a possible health claim, tumors
on the

13 backs of mice. It is an explication of
that

14 situation.

15 MR. FERGUSON: It is his motion.

I am a

16 little bit bewildered, your Honor, so I
don't know how

17 to respond.

18 THE COURT: Well, my ruling was
what it was.

19 I think I stated it as carefully as I was
able at the

20 time I gave the ruling. The plaintiff's
redirect at

21 this time, absent further showing outside
the presence

22 of the jury, will be related to the
advertisement at

23 issue and other information which may
include

24 advertising information related to smoking
and health.

25 To that extent, I have found a waiver. I
have not

05788

1 found a broader waiver which would permit
an inquiry

2 through this witness, even if he were
qualified on
3 this subject, as to what Marlboro could
have disclosed
4 in its advertising or promotion.
5 I regard this as a serious and
difficult
6 question, waiver, and I believe that
fairness requires
7 this kind of examination to respond to the
examination
8 that has already been conducted by
defendants. But I
9 would appreciate it if the parties would
more fully
10 brief the waiver of pre-emption issue
before we are
11 faced with another similar situation, if
there is some
12 jurisdictional questions or questions of
similarity to
13 other federal statutes, including the
Federal
14 Insecticide, Fungicide and Rodenticide Act,
7 USC,
15 Section 136. There are questions regarding
analogy to
16 ERISA. Whether that analogy is
appropriate, whether
17 the analogy to the Labor/Management
Relations Act is
18 appropriate, the extent of waivability,
whether this
19 is a jurisdictional offense that cannot be
waived.

20
21
22
23
24
25
05789

1 Any lack of clarity there?
2 MR. FERGUSON: Yeah. I'm sorry,
your Honor,
3 but it is a little unclear to me. If I
can only ask
4 about this advertisement, then I guess I
don't know
5 what has been waived.
6 THE COURT: Well, absent any
finding of
7 waiver -- and perhaps I should even use
that term in a
8 careful way to indicate that I'm not
finding
9 necessarily in this ruling a waiver of the
Protection

10 Act. I am finding that the proper cross-examination
11 may include an inquiry into what other
12 information
13 relevant to smoking and health could
14 have been
15 included in this Liggett advertising
16 of XA, and
17 arguably should have been included.
18 So to that extent you may inquire.
19 You may
20 not go on to other products or broader
21 inquiry.
22 MR. FERGUSON: Thank you. That
23 was helpful.
24 I understand. Mr. Luvera is saying that --
25 this is
26 Mr. Webb's discussion of it, Mr. Luvera?
27 MR. LUVERA: I don't know if the
28 Court wants
29 it or not. This is a page reference, your
30 Honor, to
31 where the discussion begins, the FTC
32 guidelines, leads
33 into this description of this particular
34 advertisement. Just the page number.
35 THE COURT: I reviewed the
36 transcript that
37 05790
38 1 was related, including pages 5494, et seq.,
39 and I also
40 2 looked back at the ruling and the
41 discussion that
42 3 preceded the ruling at 5617.
43 4 MR. LUVERA: Correct. Very good.
44 5 THE COURT: Okay. We will get
45 started. I
46 6 understand we may be able to press
47 through. I don't
48 7 know --
49 8 Where do you think you stand, Mr.
50 Ferguson,
51 9 with the time needed for your redirect?
52 10 MR. FERGUSON: I'm not going to
53 tell him.
54 11 THE COURT: You don't have to
55 tell him. You
56 12 tell me after they are done, though,
57 because I want --
58 13 I want to give you the time you need, if it
59 is
60 14 realistic that it will conclude, otherwise
61 I will
62 15 break at 4:00.
63 16 MR. FERGUSON: I have about an
64 hour, your
65 17 Honor, but I am considering ways to
66 collapse that to
67 18 much less, if possible. I would really
68 like to get
69 19 the witness off.
70 20 THE COURT: Just tell me when
71 cross is

21 completely concluded whether you think
it is useful to
22 go on, because I would break at 4:00 if
I thought it
23 was hopeless.
24 MR. FERGUSON: Let me see where
they are, and
25 I can give you a yea or nay at that
point.

05791

1 THE COURT: Fair enough.
2 (Jury present.)
3 THE COURT: Please sit down.
4 BY MR. WEBB:
5 Q Mr. Meyer, I want to pick up
where we left
6 off. We were talking about this meeting
that took
7 place on October 5th where the decision
was made,
8 actually it is reflected at the bottom of
the memo,
9 that you would not go meet with the FTC.
10 Do you see that?
11 A Yes.
12 Q The decisions that were made that
day by
13 these Liggett executives that -- the plan
that is set
14 forth in this memo -- do you have --
15 A Yes.
16 Q The various plans that were set
forth in this
17 memo, including to select and proceed to
contact one
18 or more foreign tobacco companies, which
might have an
19 interest in exploiting this invention with
a view
20 toward negotiation of a license. There
is nothing
21 irrational about the decisions made
that day by
22 Liggett from a business standpoint, are
there?
23 A I don't think so.
24 Q In fact, if Liggett at that time -
- if you
25 look at the issues that Liggett had to
address -- let

05792

1 me show you another document. I am going
to handed to
2 you a document that is in evidence
AS001309. This is
3 a document dated November 2nd, 1978, and it
says it is
4 a review of the status of XA.
5 Do you see that?
6 A Yes.
7 Q I just want to show you a page --
I will turn
8 to page 2. This status report sets forth

some

9 potential problems that Liggett faced in
developing

10 the XA product in the United States.

11 Do you see that, sir?

12 A Yes.

13 Q And let's go through this somewhat
quickly.

14 My question, do you agree these were
problems that

15 Liggett had to deal with, number 1, that
the

16 anti-smoking lobby will fight tooth and
nail?

17 Do you agree with that?

18 A I'm not sure I agree with that.

19 Q You don't think there is an
anti-smoking

20 lobby in the United States that
challenges new

21 products that have been introduced into
the

22 marketplace that are supposedly healthier
or safer?

23 A That is not my problem. My
problem is that

24 in my informal discussions, although I
would have

25 anticipated, you know, that the American
Cancer

05793

1 Society and others would have been really
opposed to

2 anything like a better cigarette, that
wasn't the

3 indication I had gotten. I mean, I would
be happy to

4 agree with the rest of these statements,
but I don't

5 think I would agree with number 1, because
my initial

6 and informal discussions suggested they
had a more

7 open mind than I thought.

8 Q The problems of this XA product
that we have

9 been through in the last day or so, I am
not going

10 back through them obviously, but you would
agree there

11 were some significant problems with this
product as

12 far as the technology of nitrates and
palladium and

13 cobalt. Wouldn't those be pretty good
targets for the

14 anti-smoking lobby to attack this
cigarette?

15 A They would be good targets, but
there were

16 also some significant potential benefits.
And

17 certainly back in '78 we thought it

balanced out on
18 the side of the plus.
19 Q What were the benefits beyond
reducing tumors
20 on the backs of mice?
21 A We all thought that was a pretty
significant
22 benefit.
23 Q Which could not be extrapolated to
humans?
24 A Well, we certainly -- we weren't
ready to
25 concede that the data could, but we had no
evidence
05794
1 that that would not have been eventually
extrapolated.
2 Q You mean people out there,
consumers would
3 somehow think if it works with mice it is
going to
4 work with us?
5 A No, if people started smoking the
cigarette,
6 whether it be in a limited test or not,
that the
7 epidemiology data that would come from that
might very
8 well prove we had the breakthrough product
that the
9 people at Liggett thought they did. Forget
me. I am
10 only hearing what they are telling me.
11 Q Although if you wait for the
epidemiology
12 data, you are going to wait for years
before you get
13 that data?
14 A I think we talked about five years
at the
15 minimum.
16 Q Five years before Liggett could
even think
17 about introducing the product?
18 A Five years -- put it this way, if
the
19 commission would have said go, it would
have been five
20 years before you had the kind of data that
really
21 established whether or not it was a safer
cigarette.
22 Q Well, let's see how many of these
others you
23 disagree with.
24 Federal Trade Commission could
classify it as
25 a health advertised product and enjoin us
from
05795
1 advertising and marketing it.
2 A Absolutely.
3 Q You agree with that?

4 A Yes.
5 Q Number 3, since palladium is a
metal, the
6 Food and Drug Administration could label it
a foreign
7 substance and could seek to stop its
marketing.
8 A I would put it a little different
than that.
9 I would have called it perhaps a drug. In
my memo I
10 think I reference that. But I agree with
that.
11 Q Number 4, inhalation studies prove
negative.
12 A That's possible, although
everything we saw
13 to date suggests that wouldn't happen, but
that is
14 possible.
15 Q Blood tests could prove negative.
16 A Same answer.
17 Q Marketing efforts could make us
liable to
18 cancer litigation?
19 A I'm not sure I agree as strongly
with some of
20 it.
21 Q I am going to read now number 7.
Are you
22 with me?
23 Negative competitive reaction is
possible,
24 resulting in downgrading of the product by
25 competitors.
05796
1 Do you see that?
2 A Yes.
3 Q Competitors, if they wanted to,
have a right
4 to attack the product, if they think it is
inadequate,
5 do they not?
6 A Sure do.
7 Q That's what competition is all
about?
8 A Truthful downgrading of the
product is
9 perfectly appropriate.
10 Q Well, we saw the Liggett document
where
11 Liggett's own scientist thought that Philip
Morris and
12 Reynolds would have a pretty good basis to
attack the
13 product on the level of PAHs, anyway?
14 A If those guys were right, that
would have
15 been a big problem.
16 Q Let's go on. Negative competitive
reaction
17 also, B, putting pressure on government to
enjoin its

18 sale.
19 A Right, there is no question the
competitors
20 would have been urging the FTC to act to
stop us from
21 selling the product.
22 Q And next would be negative public
reaction --
23 by the way, I am going to go back. There
is nothing
24 improper about competitors downgrading the
product if
25 they honestly felt it should be downgraded,
is there?
05797

1 A As long as it is truthful
disparagement,
2 there is nothing wrong with it.
3 Q And there is nothing wrong with
other
4 companies going to the government and
complaining
5 about the product if they honestly believe
there is
6 something wrong with the product?
7 A We don't want to discuss the
limits of Norr
8 Pennington or Parker v. Brown, but in
antitrust law it
9 is permissible to go and seek government
help to stop
10 a competitor from doing something which you
deem
11 inappropriate.
12 Q Thank you. Number 8, negative
public
13 reaction to the idea of a foreign substance
in a
14 cigarette.
15 A Possible.
16 Q I mean, when people are told they
are smoking
17 cobalt and palladium, they might have a
negative
18 reaction?
19 A Possibly.
20 Q The public might not like the
taste,
21 packaging, name, promotion or
advertising?
22 A Sure.
23 Q Production costs might
require premium
24 pricing?
25 A Yes.
05798
1 Q Number 11, Liggett Group
board might say no
2 because of costs or risks involved?
3 A Yes.
4 Q And number 12, it might be
so successful
5 regionally that we might not meet

the demand.

6 A I remember that.

7 Q This document also goes on to talk about,

8 even in 1978 this plan to contact a foreign

9 government. I am -- are you with me, I am on page 7?

10 Are you with me?

11 A Not yet.

12 Q Are you with me?

13 A Okay.

14 Q Page 7. Other ways to market possible

15 contingency plans.

16 Do you see that?

17 A Um-hum.

18 Q Through overseas licensing arrangements with

19 foreign governments in countries where government has

20 cigarette monopoly, e.g., Japan, Italy, others.

21 Do you see that?

22 A Yes.

23 Q That is -- that is what actually eventually

24 happened when you get up into the 1979 and 1980 time

25 period, is that correct?

05799

1 A I believe so, but I'm not sure exactly

2 whether or not -- that's inclusive or not, but

3 certainly it is true in some respects.

4 Q I highlighted one the advantages that Liggett

5 set forth in this memo. Do you see number G -- letter

6 G?

7 A I do.

8 Q By the time a cigarette enters U.S. market

9 momentum has built up.

10 Do you see that?

11 A Yes.

12 Q Now, does that look to you like even back in

13 1978 Liggett understood there may be some business

14 benefit to getting this product introduced overseas,

15 build up momentum, and then come back and introduce it

16 into the United States?

17 A That's right.

18 Q Now -- and maybe I can try to shortcut this.

19 Tell me if I am correct. You are generally aware that

20 during the 1980 and 1981 time period

Liggett did
21 contact a number of foreign governments --
I'm sorry,
22 foreign tobacco companies and attempt to
get those
23 companies interested in licensing the XA
technology,
24 is that correct?
25 A Yes. I will put it this way. I
understand
05800

1 they contacted at least four.
2 Q Okay. That's fine. And the net
result of
3 that is that none of those companies that
were
4 contacted in the foreign countries were
interested in
5 entering into a license agreement with
Liggett, is
6 that correct?
7 A That's the right conclusion,
although it was
8 my understanding, and it was from just
information I
9 had at the time, that one of the companies
had
10 virtually agreed to an arrangement, but
then it
11 changed their minds. So, in other words,
there was
12 interest by one, there was not interest by
three. But
13 the one that had interest then changed its
mind.

14 Q Was the one that had interest in
West
15 Germany?
16 A I thought the one that had
interest was in
17 Switzerland.
18 Q That's final. Whether they had
interest or
19 not, they did eventually agree to enter
into a license
20 agreement with Liggett, is that correct?
21 A That's right.

22 Q Did anybody at Liggett tell you
that these
23 foreign companies were very
sophisticated and they
24 were asking some of the same questions
about nitrates
25 and palladium and cobalt that we have
been talking
05801

1 about here today?
2 A I really didn't have -- at the
time I
3 certainly didn't have those kinds of
discussions.
4 Q Okay. Well, let me show you a
document,

5 then.
6 MR. FERGUSON: Foundation,
your Honor. I
7 don't know if he is refreshing or what's
happening.
8 THE COURT: Let's hear if -- if
the document
9 is in evidence and from a relevant period
we will
10 allow it.
11 BY MR. WEBB:
12 Q I will show you a document that
is in
13 evidence, it is marked as Defense Exhibit
AS001296.
14 I will hand it to you and display the
first page to
15 the jury.
16 This document, at least if we
look at the
17 top, it says, responses to question raised
by Reemstma
18 representatives at the meeting in Hamburg -
- Hamburg
19 is in West Germany, is that correct?
20 A I believe so.
21 Q -- on September 24th, 1980.
22 Do you see that?
23 A Yes.
24 Q And that company that I may be
25 mispronouncing, we heard about it earlier
in the case,
05802
1 that was a large tobacco company in
Germany, is that
2 correct, or did you know that or hear of
it?
3 A I thought -- my recollection was
if they were
4 interested they were going to introduce
this through
5 an affiliate in Switzerland.
6 Q Okay. I am asking you, is that
what your
7 understanding was?
8 A That's my recollection.
9 Q Did you understand the company was
actually a
10 company that was headquartered in West
Germany?
11 A I believe so, at the time.
12 Q I am not going to spend a lot of
time on
13 this, but let's just look at some of the
questions
14 that were being asked by this foreign
company. I am
15 looking at this question right here.
16 Question: The nitrate --
nitrate nitrogen
17 content contributes to higher yield of NO
and
18 nitrosamines. Can we prove this is not a

problem?

19 Do you see that question being asked?

20 A Right.

21 Q That was the same kind of issue that we are

22 talking about here today?

23 A Right. And in fairness, the answers these

24 guys are proposing are the same answers they were

25 giving me. You see in the answers that materials

05803

1 should create no greater problem to smokers of our

2 products than to smokers of these current brands in

3 the market. They are saying the same thing to these

4 guys as they were saying to me.

5 Q "These guys" being the German tobacco

6 company?

7 A The folks from Reemstma.

8 Q This company asked Liggett, if the biological

9 relevance of these compounds is not detectable in

10 mouse skin painting experiments. Mouse skin doesn't

11 do anything to prove or disprove nitrosamines. Our

12 inhalation for rats is too short to prove anything.

13 Use hamsters, dogs or monkeys.

14 Do you see those questions?

15 A I sure do.

16 Q Look at the question being asked on the next

17 page. Mouse skin painting doesn't do anything to

18 prove or disprove nitrosamines.

19 Do you see that, sir?

20 A I do.

21 Q Now, did you come to learn, in talking to

22 Liggett people, that these foreign companies were

23 saying they believed this product was not a safer

24 cigarette product and did not want to license it?

25 A No, I didn't come to learn that.

05804

1 Q What was the reason -- but wait, maybe --

2 explain to the jury, what is a license agreement?

3 A A license agreement is simply an agreement to

4 take the technology under license, meaning

you are

5 permitted to use patented technology with
some sort of

6 royalty arrangement and use it in products
that you

7 yourself manufacture.

8 Q And by the way, based on Liggett's
financial

9 condition at that time, if they could find
a partner,

10 if you will, in Europe that would finance
completing

11 the development or marketing the product,
would that

12 be a benefit to Liggett?

13 A It sure would have been.

14 Q Now, I showed you a document
earlier, and I'm

15 not going to go back to it. At least it
appears -- I

16 know you don't know anything -- let me show
it to you

17 because I don't want to misstate what I am
showing to

18 you. I showed you this earlier, and I'm
not going to

19 go back through it again. This document
that is in

20 evidence is AS1299.

21 It is this document dated in 1984
showing

22 that Liggett is still testing prototypes
of the

23 cigarette. Do you have it there, sir?

24 A I do.

25 Q And you told us that you don't
know anything

05805

1 about this document?

2 A That's right.

3 Q And did not have any conversation
with

4 Liggett about the document?

5 A That's right.

6 Q Now, that's 1984, though. Do you
see that?

7 A I see that.

8 Q Now, you said you continued to
represent

9 Liggett until, did you say late 1986 or
early 1987,

10 approximately?

11 A Yes.

12 Q Then were you still representing
Liggett in

13 1986 when a man named Bennett LeBow
purchased the

14 Liggett Tobacco Company at a distress
sale?

15 A No.

16 Q You were not?

17 A No, I was not.

18 Q Did you still have contact with

your friends

19 or acquaintances at Liggett after you stopped

20 representing them in 1986 or 1987?

21 A I had contact with two or three members of

22 the executive committee from time to time for a period

23 of two or three years after I stopped representing

24 them. But I had no contact with Bennett LeBow.

25 Q Mr. LeBow testified in this proceeding, in 05806

1 this case?

2 A I only know that because I saw a clipping on

3 the wall of the room that the lawyers use.

4 Q I will show you page 2373 of the transcript.

5 And I would just call this to your attention regarding

6 this XA product. This is Mr. LeBow in this trial.

7 Question: And during your tenure of this

8 company, since 1986, isn't it true, sir, you never

9 told anyone at Liggett that they should try and invest

10 in any technology or manufacturing process to try and

11 develop a less hazardous cigarette, did you?

12 Answer by Mr. LeBow: As you showed, our

13 market shares were going down. We don't have the

14 money to invest in anything like.

15 And then the next question. Is the answer to

16 my question, during the time that you have been at the

17 helm, sir, you have never told anyone at Liggett to

18 invest in technology to try and develop a less

19 hazardous cigarette?

20 Answer: Up until recently that was true.

21 Now, my question to you is, in conversations

22 that you had with acquaintances or professional

23 lawyers that you got to know at Liggett after Mr.

24 LeBow bought the company did anybody -- did anyone at

25 Liggett tell you that Mr. LeBow did not support the

05807

1 development of a safer cigarette, such as

the XA
2 cigarette?
3 A No.
4 Q Let me go to a completely
different area.
5 Let me ask you one more question about
foreign
6 countries, if I might.
7 Do you remember any discussions,
Mr. Meyer,
8 that when Liggett was trying to go overseas
and to
9 find a company that would agree to license
the product
10 from Liggett, the XA technology, did anyone
from
11 Liggett discuss with you a plan that
they were
12 discussing that because B&W -- you
know, B&W the
13 tobacco company in the United States, you
are familiar
14 with that?
15 A Yes.
16 Q Because B&W had foreign
connections with a
17 company called British American Tobacco,
that that
18 might present a unique combination of
offering Liggett
19 the opportunity to test the product abroad
and then
20 extend it back into the United States?
21 A No.
22 Q Another subject matter. Mr.
Ferguson asked
23 you questions about something that are
called joint
24 defense agreements or joint defense
arrangements. Do
25 you recall Mr. Ferguson's questions about
that?
05808
1 A Yes.
2 Q Tell the jury, what are joint
defense
3 agreements or join defense arrangements?
4 What are they, sir?
5 A As I think I tried to explain,
they are when
6 several defendants get together and agree
to share
7 documents and share information so that
they can best
8 present a unified defense to a common
complaint.
9 Q Joint defense agreements or
joint defense
10 arrangements are quite common among
companies who are
11 jointly named and sued in lawsuits, is
that correct?
12 A Yes.

13 Q Once a party brings a lawsuit
against a
14 number of different companies and sues
them jointly in
15 the same lawsuit, those companies do have
a common
16 interest in working together to defend
against the
17 lawsuit, is that fair to say?

18 A Yes.

19 Q And it is recognized, is it not,
sir, and you
20 are aware of this, that fairness dictates
that the
21 lawyers from those companies have the
right to enter
22 into these agreements so the lawyers can
work together
23 in addressing common issues?

24 A Yes.

25 Q And the underlying rationale for
those
05809

1 agreements -- strike the question.

2 You participated in themes
agreements, have

3 you not?

4 A Yes.

5 Q As a lawyer?

6 A Yes.

7 Q The underlying rationale for
those joint

8 defense arrangements is that each company
has its

9 right to have the effective assistance of a
lawyer,

10 and in a joint defense situation the
lawyers often

11 cannot effectively represent their clients
unless they

12 have the opportunity to work together and
jointly

13 address common issues.

14 Is that a fair statement?

15 A Yes.

16 Q These joint defense agreements are
perfectly

17 legal, is that correct?

18 A Yes.

19 Q There is nothing unethical about
such

20 agreements, is there?

21 A There is nothing unethical.

22 Q And in fact they are very very
common in

23 almost every circumstance where there is
significant

24 litigation or a regulatory proceeding, or
companies

25 have a common interest in the contested
matter, is

05810

1 that fair to say?

2 A Yes.

3 Q And let's take the tobacco
industry to be

4 specific. You are aware as an attorney
for Liggett

5 that since the early 1950s companies in
the tobacco

6 industry have constantly faced large
numbers of

7 lawsuits and adversarial regulatory
proceedings, is

8 that fair to say?

9 A Yes.

10 Q And you are aware that there
are joint

11 defense agreements between lawyers
representing

12 tobacco companies so that they can
communicate on

13 common issues with each other, is that
correct?

14 A Yes.

15 Q And in fact you, as counsel
for Liggett,

16 based on certain matters you were
involved in on

17 behalf of Liggett, you participated in
meetings with

18 other tobacco company lawyers under joint
defense

19 agreements or arrangements, is that
correct?

20 A Yes.

21 Q In fact, because of the
frequency of joint

22 litigation and adversarial regulatory
proceedings

23 involving tobacco companies, the tobacco
companies

24 actually had a committee of lawyers,
that was

25 originally called the ad hoc committee
and later

05811

1 became known as the Committee of
Counsel, is that

2 correct?

3 A Yes.

4 Q And those groups of lawyers
from various

5 tobacco companies would meet together on
a periodic

6 basis to discuss issues in which they
had a common

7 interest because of pending litigation
or these

8 regulatory proceedings, is that correct?

9 A Yes.

10 Q You actually attended some of
those meetings

11 of the Committee of Counsel so that you
could

12 communicate with other tobacco company

lawyers on

13 common issues, is that correct?

14 A It is.

15 Q And when you did that, you did not believe

16 you did anything wrong, did you?

17 A I believed I did nothing wrong.

18 Q That was a bad --

19 A I believed I did nothing wrong.

20 Q You believed you did nothing wrong, you

21 believed you did nothing unethical?

22 A That's right.

23 Q Or nothing improper?

24 A That's right.

25 Q In fact, do you agree with me, sir, that the

05812

1 tobacco industry may would be one of the best examples

2 you can think of where different companies in the

3 industry are so frequently being sued together or

4 involved in regulatory proceedings that it is a

5 classic example of the need for lawyers from the

6 companies to meet together to discuss common issues?

7 A Well, perhaps second to politicians, I would

8 agree with you.

9 Q Okay. I will accept that.

10 One last issue. You told us earlier that

11 Liggett was issued the patent for this XA technology

12 in 1977, is that correct?

13 A Yes. I guess that is the first patent, I

14 will put it that way.

15 Q Right. That's is one I showed you, 12977,

16 that's the one I showed you that was in the book that

17 you were going to give to the FTC --

18 A Right.

19 Q -- that patented the actual technology?

20 A Yes.

21 Q Now, so the jury understands, once that

22 patent -- strike the question.

23 Is it your understanding that up to the time

24 that Liggett filed the patent, up to that time Liggett

25 was holding this invention, if you will, this

05813

1 technology, very confidential within the company?

2 A That's my understanding.
3 Q Because Liggett wanted to protect
its
4 property rights in developing that
technology, is that
5 fair to say?
6 A That is my understanding.
7 Q Once Liggett filed the patent in
1977, the
8 patent then becomes part of what we as
lawyers call
9 the public domain, it is part of the public
record and
10 people can have access to it, is that
correct?
11 A Yes.
12 Q So once the patent was filed,
anyone that
13 wanted to understand the design and the
technology of
14 the XA cigarette could do so by reading the
patent
15 that I showed you here in the courtroom?
16 A Yes, that's right.
17 Q So from -- let me just ask, from
1977 up to
18 today, are you aware of anybody in
government or in
19 any public health agency, or any scientist
outside of
20 Liggett that has ever supported the concept
that the
21 XA product was a safer cigarette that
should have been
22 marketed and sold in the United States to
smokers?
23 A Just so I am clear, are you
including like a
24 Charlie Kensler, and A. D. Little on that?
25 Q No. Little was a contractor of
Liggett, is
05814
1 that correct?
2 A Just to be sure, because I view
him outside
3 that scope. If you include the A. D.
Little in that,
4 not that I am aware of.
5 Q For example, you are not aware of
anyone from
6 the National Cancer Institute that supported
7 that concept?
8 A Only informally and were encouraged
by it
9 privately in meetings, that's all.
10 Q Did they ever say they were going
to support
11 it to be introduced into the marketplace?
12 A I think I testified to that in my
deposition.
13 The only thing I ever heard from anybody on
the
14 National Cancer side was that Kensler was

encouraged

15 by what Gori, Gio Gori had said to him,
but no public

16 announcements.

17 Q And Liggett didn't finance the
million

18 dollars for the testing?

19 A That's right.

20 Q Did anyone tell you from the
Surgeon

21 General's Office of the United States --

22 A I don't think so.

23 Q How about the Federal Trade
Commission?

24 A No one said anything publicly.

25 Q The Food and Drug
Administration?

05815

1 A I don't know, but I don't think
so.

2 Q Any other federal government
health agency

3 that you know of ever stated they would
support this

4 product being put into the marketplace?

5 A I don't believe so.

6 Q Did you ever hear of any state
public health

7 agency of any of our fifty states ever say
that they

8 would support this technology to be
introduced as a

9 safer cigarette?

10 A No, I don't think so.

11 Q How about the American Heart
Association?

12 A Same answer.

13 Q American Lung Association?

14 A Same answer.

15 Q American Medical Association?

16 A Same answer.

17 Q The American Cancer Society?

18 A Same answer.

19 Q Let's take it one step further,
this patent,

20 once it went into the market -- or once
the patent

21 issued in 1977, for seventeen years Liggett
received

22 patent protection so that no one else could
take their

23 idea, their technology and manufacture and
sell a

24 product that used the XA design and
technology, is

25 that correct?

05816

1 A Well, at least that long. I
don't know

2 whether some of the related patents
extended beyond

3 1994 or not, but certainly for that
long. And the

4 answer is yes.
5 Q This one at least, '77 one would
have expired
6 in '94?
7 A That's right.
8 Q So that means that at least for
the last four
9 years, since 1994, if Liggett's patent of
this XA
10 product -- if another tobacco company
wanted to take
11 this technology and develop a safer
cigarette and put
12 it in the marketplace, they could try to do
so after
13 1994?
14 A I think that is arguably right.
15 Q And you actually told us at one
point in time
16 -- let me make sure -- you were telling us
that
17 Liggett was going to try to purchase 60
billion ounces
18 of palladium?
19 A If I said that, I misspoke. I
think my
20 recollection was that there were --
that there was
21 enough palladium in the world without
adversely
22 affecting price to supply 60 billion
ounces or
23 something like that.
24 Q Okay. But did you tell us that
then Liggett
25 was going to purchase 60 billion ounces -
- produce 60
05817
1 billion cigarettes and then capture sixty
percent of
2 the cigarette market?
3 A No, I said -- the questions I
thought were
4 what the maximum potential market share
of Liggett
5 might be were they able to sell that much
product.
6 And it was 60 billion ounces, as I recall,
translated
7 to 60 percent of the market in cigarettes.
8 Q But you are not suggesting that
you thought
9 Liggett could capture sixty percent of the
cigarette
10 market with the product we have been
talking about for
11 the last two days?
12 A I am certainly not suggesting
that.
13 Q Even if it had any value -- if
this product
14 had commercial value, do you think that in
the last

15 four years that another cigarette company
might have
16 tried to pick up the technology and
introduce the
17 product?
18 A Possibly.
19 Q In fact, let me show you a
document. I will
20 end with my company that is in evidence --
not my
21 company, but the company I represent,
Philip Morris.
22 This is in evidence as DA241. The jury has
seen this
23 before. This is a document dated November
28, 1978.
24 It is an internal office correspondence at
Philip
25 Morris Company between a Mr. Resnik and Mr.
Goldsmith.
05818

1 Do you see that, sir?
2 A I do.
3 Q Did you know either one of those
two
4 gentlemen?
5 A I recognize Goldsmith's name, but
I don't
6 remember what position he had. I don't
know Mr.
7 Resnik.
8 Q That's fine. It says the subject
-- L&M,
9 that is Liggett & Myers, is that correct?
10 A Right.
11 Q Patent on palladium, and they cite
the patent
12 number?
13 A Yes.
14 Q Is that correct?
15 A Yes.
16 Q And let's see what Philip Morris
thought
17 about this patent. The L&M patent on the
addition of
18 palladium to tobacco incorporated in
cigarettes is of
19 no practical value for the following
reasons.
20 Do you see that, sir?
21 A I see.
22 Q That number one, palladium alone
is not
23 effective. The cigarette smoke condensate
produced by
24 the addition of palladium alone to the
tobacco was not
25 different from a control cigarette on mouse
skin
05819
1 painting tests.
2 Do you see that?
3 A Um-hum.

4 Q And that is true, is it not?
5 A I think -- palladium alone would
not be
6 effective, I think that's right.
7 Q Next, Philip Morris says,
palladium plus
8 sodium nitrate is no more effective than
sodium
9 nitrate alone. The cigarette containing
palladium
10 plus three percent sodium nitrate showed an
89 percent
11 reduction in tumor incidence on mouse skin
painting
12 tests. However, the addition of only
sodium nitrate
13 by other experimenters have shown similar
results,
14 Hoffmann and Wynder, 8.3 percent sodium
nitrate, 84
15 percent reduction in tumor incidence, and
Dontenwill,
16 7.78 percent sodium nitrate, 66 percent
reduction in
17 tumor incidence.
18 Do you see that?
19 A Yes.
20 Q At least Philip Morris believed
what Liggett
21 was doing was not unique at all, and that
Wynder and
22 Hoffmann and Dontenwill showed nitrates
will cause
23 these types of tumor reductions?
24 A Obviously, I am not the
scientist or patent
25 lawyer. I thought the patent technology
-- I thought
05820
1 it was magnesium nitrate. I am not sure
it makes a
2 real difference. But I only know what I
was told at
3 the time, and that was the palladium
salts plus the
4 magnesium nitrate salts resulted in this
unique
5 reduction. And therefore when you use
sodium nitrate
6 there it is a little confusing to me.
But I hadn't
7 seen this before.
8 And I would accept the fact that
sodium
9 nitrate alone may very well have been
biologically
10 important.
11 Q Well, let's look at the last
paragraph.
12 Philip Morris said about this patent, the
addition of
13 sodium nitrate adds oxides of nitrogen to
the smoke.

14 That's the issue you and I have been
talking about?

15 A Right.

16 Q This is the nitrosamines issue,
isn't it?

17 A Yes, it is.

18 Q The addition of these quantities
of sodium

19 nitrate to cigarette tobacco produces
large amounts of

20 oxides of nitrogen in the smoke which is
completely

21 objectionable from the standpoint of
animal inhalation

22 experiments.

23 Do you see that, sir?

24 A I do.

25 Q Do you think there is anything
irrational

05821

1 about another cigarette company looking
at this

2 technology and concluding essentially
that it was

3 stupid?

4 A Based on that memo, I would say
that that

5 wouldn't be irrational.

6 MR. WEBB: I have no more
questions.

7 MR. McCORMICK: I have no
questions of this

8 witness, your Honor.

9 MR. SCHIFFERMAN: No questions,
your Honor.

10 MR. KACZYNSKI: No questions,
your Honor.

11 REDIRECT EXAMINATION

12 BY MR. FERGUSON:

13 Q Mr. Meyer, I'm back. It has
been a while.

14 Mr. Webb was just asking you a
few minutes

15 ago about joint defense arrangements. Do
you recall

16 that?

17 A Yes.

18 Q And you testified that there
wasn't anything

19 improper or unethical about firms engaging
in joint

20 defense arrangements, correct?

21 A Yes.

22 Q You also agreed with him that the
tobacco

23 industry, I think you said, except for
politicians, is

24 probably the classic case where these
kinds of

25 arrangements are necessary because they
are sued so

05822

1 often on similar grounds?

2 A Yes.
3 Q Was it important therefore that
Liggett be
4 permitted to continue to participate in
the industry
5 joint defense agreements?
6 A As I testified before, it was
absolutely
7 essential.
8 Q And was it essential in your
opinion to
9 Liggett's very survival as a business that
it be
10 allowed to continue --
11 MR. WEBB: My objection --
leading.
12 THE COURT: Sustained.
13 BY MR. FERGUSON:
14 Q How important was Liggett's
participation to
15 the joint defense agreements?
16 A I wrote a memorandum. In my
judgment it was
17 absolutely essential.
18 Q Did Mr. Greer report to you -- I
think you
19 said in your direct examination that
Liggett had been
20 threatened with expulsion from the joint
defense
21 agreement?
22 MR. WEBB: Object. Leading.
23 THE COURT: Sustained.
24 BY MR. FERGUSON:
25 Q What did Mr. Greer tell that you
Ernie
05823
1 Pepples had told him about the XA
cigarette?
2 A Well, Mr. Greer told me on more
than one
3 occasion, as I tried to explain, that
Liggett would be
4 -- that the project was stupid, idiotic,
that Liggett
5 would be excluded from any joint industrial
defense
6 activities, that it was a ridiculous
admission against
7 interest, that it was ruinous, it would be
ruinous for
8 the industry, it would be ruinous for
Liggett.
9 Q Did Mr. Greer report -- strike
that.
10 I want to talk a little bit about
the bad
11 guys that Mr. Webb was talking to you
about.
12 A The politicians?
13 Q No, the other bad guys. The ones
that appear
14 on these reports. He asked you whether it

was true
15 that the XA did not address heart
disease, do you
16 recall that?
17 A Yes.
18 Q And he also asked you whether
it was true
19 that the XA did not address chronic
obstructive
20 pulmonary disease, COPD, do you remember
that?
21 A And I think I answered that the
best I could,
22 not directly for sure, yes.
23 Q And he asked you if you agreed
that many
24 health authorities believe that cigarettes
play a role
25 in both cardiovascular disease and chronic
obstructive
05824
1 pulmonary disease, and you agreed with
that.
2 Do you recall that?
3 A Yes.
4 Q I think he also asked you if you
agreed that
5 health authorities believe that cigarettes
play a
6 causative role in lung cancer, and you
agreed to that.
7 Is that also correct?
8 A Yes.
9 Q Did the researchers believe that
mouse skin
10 was -- had similar sensitivity to human
lung tissue?
11 A Yes.
12 Q Was that one of the reasons that
mouse skin
13 painting was accepted as a substitute to
try and
14 determine carcinogenicity and
tumorigenicity of smoke
15 condensate?
16 A Accepted by the authorities --
accepted in
17 part by the authorities. Certainly
accepted by those
18 who advocated such testing, such as
Wynder, et al.
19 Q Did the testing significantly
reduce tumors
20 and carcinogenicity in the mouse skin
painting tests?
21 A Yes.
22 Q This is Exhibit 6461, page
LGM00044. And I
23 recognize that this is a little indistinct.
Can you
24 see that at all? You have it in front of
you?
25 A I have it.

05825

1 Q It says here 19Z control. Let me
do --

2 percent of animals with papillomas --
that's a tumor?

3 A Yes.

4 Q And carcinoma is a cancerous
tumor?

5 A That's my understanding.

6 Q And down, the horizontal axis is
weeks on

7 test?

8 A Yes.

9 Q And this one that starts just over
twenty

10 weeks and goes up to about forty percent of
the

11 animals having carcinoma or papilloma, it
says 19Z

12 control, is that a cigarette without the
catalyst?

13 A Yes. Without the catalyst.

14 Q And then the one that is right
beneath it

15 there is 20Z, which gets up to about
thirty-five

16 percent. It says catalyst, alone, that's
the one that

17 didn't have the magnesium nitrate in it?

18 A That's my understanding.

19 Q And then this one at the bottom
that shows

20 basically no tumors or cancer until after
sixty weeks

21 of the test, and then it looks like about
two or three

22 percent, 21Z catalyst and nitrate. The
one I

23 highlighted there, is that basically the
prototype

24 that led to the XA cigarette?

25 A That is my understanding.

05826

1 Q By the way, I was meaning to ask
you, do you

2 know where the name Epic came from? How
was that

3 chosen?

4 A The answer is I know where it
came from.

5 Q Were you part of the decision to
make the

6 name Epic in this thing?

7 A I was in a few meetings where they
discussed

8 why to use Epic.

9 Q Why was it decided to use Epic as
the name?

10 A Well, because of what I have tried
to say,

11 based on what the folks at Liggett who were
talking to

12 me at least felt, that this was a

development of very
13 significant, historical proportions. And
if you check
14 the dictionary definition of Epic, it means
-- it
15 means a lot of things. It can be a play,
it can be a
16 theatrical production, but I believe it
also means a
17 historical event of seminal importance.

That's how

18 they viewed this.

19 The folks that were promoting this
within the

20 company and the folks who I dealt with
thought that it

21 was an event of epic proportion.

22 Q The Epic or XA cigarette, did that
also have

23 any measured effect to cilia toxicity and
24 cytotoxicity, do you know what I mean by
those words?

25 A Yes. I think Mr. Webb, Counsel,
brought me

05827

1 through some of these charts. When you
look at these

2 charts I think I made reference to the fact
that there

3 were some ostensible benefits in other
areas besides

4 the incidence of tumors. And that would
have been

5 one.

6 Q Okay. Cytotoxicity, cyto is a
cell, right?

7 It is 94 in Exhibit 6461.

8 A I see it.

9 Q Cytotoxicity. And this one is
cilia

10 toxicity. You understand that cilia are
the little

11 hair-like structures that are on the cell
structures

12 of the lung?

13 A That's what I am told.

14 Q I just told you that, didn't I?
So cilia

15 toxicity would mean to you poison or
toxic effect on

16 the little hairs in the lung, correct?

17 A Yes.

18 Q And the XA on this chart is the
one in the

19 middle, right?

20 A That's right, the three bars in
the middle,

21 out of all of these charts are always the
XA.

22 Q And this says top ten brands
1977 up here.

23 And it shows in cilia toxicity that the top
ten brands

24 are two to two and a half times as high in
cilia

25 toxicity as the XA, correct?

05828

1 A Yes.

2 Q And then the low-tar brands, in
one case

3 almost the same, in the other cases close
to the XA?

4 A I would say that differently.

Anyone can

5 read these charts. To me the charts on
cilia toxicity

6 -- the reason why there is not ten bars
there, as I

7 understood, they did not do complete
testing. You

8 will see on some of these others they have
many more

9 brands evidenced by the bars.

10 But here, for example, on cilia
toxicity, as

11 I recall the stuff, there were only four
top ten

12 brands tested, and there were only three
low tar

13 brands tested. And if you take the
numbers across,

14 there was one low-tar brand that was
close to the XA

15 project. All the others were
significantly higher.

16 And the four leading brands that were
tested were

17 significantly higher on this one
particular

18 measurement.

19 Q All right. Would this suggest to
you whether

20 the XA had potential health benefits in
addition to

21 the reduced tumorigenicity in the mouse
skin painting?

22 MR. WEBB: Objection. Lack of
foundation.

23 THE COURT: Sustained.

24 BY MR. FERGUSON:

25 Q This was part of your FTC book,
wasn't it?

05829

1 A Yes.

2 Q And you reviewed it at the time?

3 A Yes.

4 Q Did you discuss the issues of
cilia toxicity

5 and cytotoxicity with the scientists at
Liggett?

6 A To a lesser extent, but to the
same degree I

7 discussed things like nitric oxide that we
went

8 through before.

9 Q This is page 9 of the same

exhibit. I think
10 we were on it before?
11 A Is there an LGM number on that?
12 Q Yeah, LGM00009.
13 A I'm sorry.
14 Q 9?
15 A 9.
16 Q I'm trying not to be as fast a
talker as Mr.
17 Webb and some of my other brethren?
18 A You can speak as fast as you can.
19 Q Found it?
20 A Got it.
21 Q This indicates that other gasses
that have
22 been singled as undesirable by health
authorities have
23 also been reduced as compared to
conventional filter
24 brands.
25 Do you recall this being in your
materials in
05830
1 1978?
2 A This definitely was and the
charts we looked
3 at were. And in fairness, I would say the
same thing
4 I said to Mr. Webb. Some of them showed a
potential
5 health benefit, and some of them showed
something like
6 in the nitric oxide that we expected to
have some
7 questions about. But there were more
benefits than
8 simply the reduction of the tumors and the
cancerous
9 tumors on the skins of mice as I recall at
that time.
10 Q Do you have a general
understanding of what
11 it is in cigarettes that is generally
credited or
12 rather accused, I guess, of being the cause
of heart
13 disease that is related to cigarettes?
14 MR. WEBB: Objection. Lack of
foundation.
15 THE COURT: Sustained.
16 MR. FERGUSON: I thought I asked
if he had
17 any information about that. So I will
rephrase the
18 question.
19 THE COURT: Yes or no. You can go
ahead and
20 answer yes or no.
21 THE WITNESS: I mean, only as a
layman would.
22 The answer would be yes, as a layman I
thought I
23 understood it would be the nicotine. That

would be my

24 layman's answer.

25 THE COURT: That sounded like more
than yes

05831

1 or no.

2 THE WITNESS: I don't know if the
answer is

3 correct, your Honor.

4 THE COURT: Go ahead.

5 BY MR. FERGUSON:

6 Q Would you turn to page 0342 in
your FTC book

7 there. I apologize to the jury that that
can't be

8 very well seen. I just want you to see the
cover page

9 right now.

10 Do you recognize that, Mr. Meyer,
as

11 something called the Hunter report?

12 A Yes.

13 Q And that was included in your FTC
book,

14 correct?

15 A Yes.

16 Q And this article includes -- this
is what

17 happens when you bring them all the way
from England,

18 they get blurry.

19 MR. WEBB: What page are you on
now?

20 MR. FERGUSON: 347.

21 THE WITNESS: I think Mr. Webb was
better at

22 that than you are.

23 BY MR. FERGUSON:

24 Q I don't think we have time to have
him fix

25 it. This is entitled Compounds in
Cigarette Smoke

05832

1 Judged as Possible Contributors to the
Health Hazards

2 of Smoking. And Dr. Hunter, who did this
report, as I

3 understand, was the chair of the smoking
and health

4 committee in Great Britain, is that right?

5 A Yes.

6 Q And this committee lists as
probable

7 contributors to the health hazards of
smoking,

8 acrolein, correct?

9 A Yes.

10 Q Cresol, whatever that is,
hydrocyanic acid?

11 A Yes.

12 Q Nitric oxide, nitrogen dioxide,
phenol.

13 These are all things you identified with

Mr. Webb?

14 A Right.

15 Q Next page, suspected contributors to the

16 health hazards of smoking includes acetaldehyde,

17 acetone, acetonitrile, something that is even worse,

18 ammonia, benzene, carbon dioxide, DDT, furfural,

19 hydrogen sulfide, on and on, correct?

20 A Right.

21 Q Did Liggett, in its development work on the

22 XA and the information that is included in your FTC

23 briefing book, examine some of those various compounds

24 that we just saw were identified as some of the

25 contributors of health problems with smoking?

05833

1 A Yes.

2 Q And they checked to see how many of those

3 were in the XA?

4 A Not all of them, but certainly some of them.

5 And I -- well, there is no question. Yes.

6 Q And did they compare some of those compounds

7 with other cigarettes?

8 A Yes.

9 Q Conventional marketed cigarettes?

10 A Yes.

11 Q Generally, what is your recollection of how

12 the XA stacked up against the popular cigarettes of

13 the day with regard to those substances it is believed

14 to contribute to disease?

15 A Well, again, we would sort of have to go back

16 through the charts. As I tried to tell Mr. Webb, it

17 was my recollection, just like in the answer that they

18 had devised for some of the questions that came and

19 their efforts to license the product abroad, that they

20 had achieved about the same level of nitric oxide or

21 nitrates as a Marlboro, maybe a little better, but

22 that in some of these other categories, I think I

23 specifically mentioned hydrogen sulfide, they had

24 actually achieved a significant reduction. And that's

25 really all that I remember.

05834

1 But if you look at the charts
you will see

2 that on some of these other elements, if
you will,

3 constituents of cigarette smoke, they
had potential

4 benefits. I mean, we didn't know
whether they were

5 benefits or not, but they had potential
benefits

6 listed. In fairness to me, you pointed
out something

7 I did not see when I thumbed this myself.
We do have

8 Dr. Hunter's report in there, which was
going to be a

9 part of the commission briefing booklet
which would

10 have said that nitric oxide and nitrogen
dioxide were

11 bad guys, in your words.

12 Q Let's look at some of the charts
that I think

13 you are referring to. This is Exhibit
6364. And I

14 will start with page LG0132558.

15 A Have you given that to me?

16 Q I thought I did. If I haven't, I
will give

17 you one.

18 Does that help?

19 A What page are you on?

20 Q I am on -- the last three digits
are 558 of

21 the --

22 MR. PHILLIPS: Are you on the same
exhibit?

23 MR. FERGUSON: Yeah. No, I'm
sorry, 6364.

24 This is a bar graph comparison. We better
put up the

25 title page of this.

05835

1 BY MR. FERGUSON:

2 Q Liggett & Myers Tobacco Company
memorandum to

3 J. D. Ross from J. D. Mold, status report,
project

4 tape. 1/6/77.

5 Have you seen this before?

6 A I'm sure that I saw it at some
point. I see

7 that it has the cigarettes identified, so I
know that

8 I saw this or a document like it at some
point.

9 Q Let's go back to page 558, the one
I had up

10 there.

11 A I've got it.

12 Q And the top table says tar. Are

you aware
13 that at some point tar was generically
identified as
14 the source of the bad guys in tobacco?
15 A Am I aware of that?
16 Q Yes.
17 A Yes.
18 Q It shows here milligrams per
cigarette of
19 tar. And is this little shaded one over
here that has
20 the A, is that the XA?
21 A Yes.
22 Q And it looks like two commercial
brands, Pall
23 Mall EM, and True have less tar. And then
this is Mr.
24 Webb's client's cigarette up here,
Marlboro?
25 A That's a Philip Morris product,
yes.
05836

1 Q And that looks like it is at
about 18
2 milligrams tar compared to XAs 7 and a
half, roughly,
3 correct?
4 A That's what the chart says.
5 Q Nicotine. Again, the shaded
column A is the
6 XA?
7 A Yes.
8 Q Tareyton, is that an American
Tobacco brand?
9 A Yes.
10 Q Winston is R.J. Reynolds?
11 A Yes.
12 Q Marlboro is Philip Morris?
13 A Yes.
14 Q Viceroy is Lorillard?
15 A Yes.
16 Q So within those two parameters,
am I correct
17 that the XA ranks lowerer than most of the
popular
18 commercial brands?
19 A Right. You could have drawn the
same
20 conclusions without identifying the brands
from these
21 charts that were in the reports and the
briefing
22 booklet.
23 Q Turn to the next page, please.
24 Which is 559, Counsel.
25 The upper graph here is CO. Mr.
Meyer, is
05837

1 that carbon monoxide?
2 A Yes.
3 Q One of the bad guys, right?
4 A That's my understanding.
5 Q And, again, here we have got True

cigarettes

6 over on the end, next to that at a slightly higher

7 level is the XA, and, again, the popular brands,

8 Winston, Tareyton, Kent, Viceroy, Marlboro, were all

9 significantly higher than the XA in carbon monoxide?

10 A That's what it says.

11 Q Beneath that is NO, this is nitric oxide?

12 A That's right.

13 Q Is nitric oxide one of those substances that

14 is produced by adding nitrates that Mr. Webb was

15 referring to?

16 A It can be.

17 Q And this shows -- I have a few more here that

18 have lower levels of nitric oxide, Multifilter, which

19 is Philip Morris, True, Doral, Kent Golden Light, Pall

20 Mall Extra Mild and True. However, having more

21 nitrous oxide, leading the pack, is Marlboro, correct?

22 A Yes.

23 Q Acrolein, whatever it is, and hydrogen

24 cyanide, those are two of the bad guys?

25 A Yes.

05838

1 Q And these show for acrolein --

2 How do you pronounce that, Mr. Webb?

3 MR. WEBB: I'm not sure.

4 BY MR. FERGUSON:

5 Q It shows XA as the lowest, right?

6 A That's what it shows.

7 Q And the four biggest for acrolein are Kent,

8 Winston, Viceroy, Vantage, and number 5 is Marlboro,

9 correct?

10 A Yes.

11 Q Is HCN hydrogen cyanide?

12 A Yes.

13 Q Is that one of the bad guys?

14 A Very bad.

15 Q Down at the bottom we have True, and leading

16 the pack Marlboro, three times as much hydrogen

17 cyanide, with three times as much as XA?

18 A Correct.

19 Q Phenols, pretty much the same kind of

20 picture, correct?

21 A Yes.

22 Q Page 562, denominated NNN, and I

used to know
23 how to pronounce that. Can you pronounce
it? Is that
24 a nitrosamine?
25 A I'm not positive. I am just
checking this
05839
1 other document to see whether it is
identified
2 somewhat more specifically.
3 JUROR: Counsel, can you get the
corner down
4 so I can see it? I would appreciate it.
5 MR. FERGUSON: There you go.
6 BY MR. FERGUSON:
7 Q Did you find that?
8 A Yes.
9 Q Whatever it is, XA is quite a bit
lower than
10 the others?
11 A Right.
12 Q I think you mentioned something in
your
13 cross-examination to one of Mr. Webb's
questions. I
14 don't know how I stay in one spot and
always lose that
15 pad of paper.
16 You took some pleasure in the fact
that the
17 XA tested lower in some parameters than the
Marlboro,
18 have I got that right?
19 A I don't know -- it has been a long
day. I
20 feel sorry for the jury.
21 I don't know that I took some
pleasure. I
22 think everyone was somewhat relieved when
they saw
23 that the nitrates or the nitric oxide were
at levels
24 below the Marlboro, because the Marlboro
was, after
25 all, the number 1 selling cigarette at the
time. I
05840
1 think it still is.
2 Q Mr. Luvera tells me if I go all
the way down
3 here I can focus it. I assume he has
better eyes than
4 I do.
5 This is again from your FTC
briefing book,
6 Exhibit 6461. And this is page LGM337.
7 It reads, constituent levels
milligram per
8 cigarette in smoke of reference cigarettes,
inhalation
9 control cigarette and prototype cigarettes.
10 Now, the prototype cigarettes are
the XAs, is

11 that correct?
12 A Yes.
13 Q And it appears -- do I have this
right, the
14 control cigarette is a Marlboro?
15 A That's what it says. 85
millimeters.
16 Q Let's go through this. The first
item here
17 is tar, total particulate matter, correct,
with
18 Marlboro having 20 milligrams, correct?
19 A Right.
20 Q And the XAs, the lowest being 7
milligrams,
21 up to 13 milligrams?
22 A Correct.
23 Q I want to focus here on a couple
of bad guys
24 that you identified.
25 Carbon monoxide. Marlboro has
16.4
05841
1 milligrams per cigarette of carbon
monoxide.
2 Have I read that correctly?
3 A Yes.
4 Q And the XA has 5.4 for the one
prototype, to
5 a high of 11.6, correct?
6 A Yes.
7 Q Nitric oxide, Marlboro is .33
milligrams per
8 cigarette, XA .34 for two of them, and .4
for one,
9 correct?
10 A That's correct.
11 Q Phenols, another bad guy -- .061
for
12 Marlboro, .021 to .016 for XA.
13 Hydrogen cyanide, .34 for
Marlboro, less
14 than .1 for all the XAs, correct?
15 A Yes. On the phenols, I think you
made a
16 mistake on phenols. I think it is 3.6 and
3.6. And I
17 certainly don't want to correct any more
mistakes to
18 keep you going.
19 Q No, I won't do that. I won't go
through the
20 rest of the chart.
21 The point I wanted to ask you
about is that,
22 am I correct, in virtually every parameter
of the bad
23 guys that was tested by Liggett that, as
contrasted by
24 the Marlboro, the XA was lower in each of
those
25 constituents or the same as the Marlboro?
05842

1 A Well, what you read me or the ones
we looked
2 at, remember, it is just the smallest
little tick
3 higher on nitric oxide. And that's what we
tried to
4 say, that -- the nitrate being what it was,
the nitric
5 oxide piece was sort of at the level of
Marlboro. It
6 wouldn't be fair to say it was lower, it
wasn't. It
7 was just a tick higher.
8 MR. FERGUSON: About a half hour.
9 THE COURT: Well --
10 MR. FERGUSON: And I anticipate
there may be
11 some over there.
12 THE COURT: That's right on the
cusp
13 actually. I would like to accommodate Mr.
Meyer if I
14 could. Can you finish by 4:30 at the
latest? Will
15 you commit -- will you commit to that?
16 MR. FERGUSON: If Mr. Luvera
promises he will
17 come and tap me at 4:25, I will commit to
that.
18 THE COURT: I will do better. I
will tell
19 you when it is 4:25. Is there anyone who
has an
20 unbreakable commitment that is coming
up? I would
21 like to accommodate the witness, who is
otherwise
22 going to have to return next week from
the east coast.
23 If we run for another perhaps forty
minutes, we will
24 be done.
25 Any calls that you would like
the bailiff to
05843
1 make?
2 Okay. We will continue.
3 Go ahead when you are ready, Mr.
Ferguson.
4 BY MR. FERGUSON:
5 Q Do you remember this chart that
Mr. Webb had
6 here, Mr. Meyer?
7 A I do.
8 Q The to be proven chart?
9 A Yes.
10 Q My recollection is he asked you
-- he said I
11 want to ask you if you have any evidence
to offer with
12 regard to these. Is that your
recollection?
13 A Yes.

14 Q So would it be more accurate to
say I will
15 testify about rather than to be proven?
16 A I didn't have any problem with
the way he put
17 it, but it would be okay to say that,
too.
18 Q Do you know whether XA is a
safer cigarette
19 that would cause less disease in smokers?
You don't
20 know, do you?
21 A Am I testifying about that?
22 Q Yes, sir.
23 A No.
24 Q You don't know?
25 A No, I'm not testifying about
that.
05844
1 Q Not testifying.
2 Are you testifying in the area
that the XA
3 would be advertised so that smokers would
understand
4 the benefits?
5 A Well, I think he is right in saying
no there.
6 It was not going to be advertised in a way
that there
7 would be any benefit claims at all. If
any benefits
8 were stated, they certainly would be
offset with the
9 negative information. So that is sort of
in the
10 middle there.
11 Q We will leave the no there.
12 3, Medicaid smokers would choose
XA instead
13 of other cigarettes.
14 Are you testifying about that?
15 A I am not testifying about that.
16 Q Not testifying.
17 4, Medicaid smokers would have
less smoker
18 related disease with XA. Are you
testifying about
19 that?
20 A I am not testifying about that.
21 Q Finally, 5, the State of
Washington would
22 have less Medicaid health care costs
because of XA.
23 Are you testifying about that?
24 A I am not testifying about that.
25 JUROR: Is this a chart that has
been entered
05845
1 into evidence?
2 MR. FERGUSON: No, it hasn't.
3 BY MR. FERGUSON:
4 Q We are back to stickman here, we
will call

5 this.
6 Smoke Epic. This is the mock
advertisement
7 that Mr. Webb put up for you involving the
Epic
8 cigarette. Do you recall that?
9 A Very well.
10 Q And on the second page here,
warning,
11 increased nitrogen oxides in Epic may be
dangerous to
12 your health.
13 Have I got that right?
14 A Yes.
15 Q Based on what I just showed you,
could this
16 say -- would it be permissible in your
opinion to add,
17 but less than Marlboro?
18 A No, that wouldn't be right for a
couple of
19 reasons. Number one, because Marlboro was
a tick --
20 just a tick lower. So you couldn't say
that.
21 And then, again, I don't know
what the right
22 level would be for nitric oxide. I mean,
it may very
23 well be that both those cigarettes at 34,
whatever
24 that measurement was, or 33, were still
perfectly
25 within normal limits or not. But that -
- you couldn't
05846
1 say that.
2 Q Could you say, but the same as
Marlboro?
3 A No, because that would be a
health claim.
4 That would suggest that the Marlboro
standard was the
5 correct standard. And I don't think you
could say
6 that.
7 Q Could you make any comparative
claim at all?
8 A I don't think you can make any
comparative
9 claim about a subject like that because
it would be a
10 health claim, and I don't think you could
substantiate
11 it.
12 Q In talking about PAH and PCAH, I
think you
13 acknowledged for Mr. Webb that there was
no particular
14 difference in the levels of it but there
was some
15 difference in the character or quality of
it. I

16 didn't quite understand that.
17 A Well, I probably didn't explain
it very well,
18 because I think this jury has heard
enough that I am
19 not a scientist. My understanding was
even though the
20 PAH or PCAH levels might be the same in
some
21 cigarettes that weren't produced pursuant
to the
22 patent process, as the patent process
cigarettes -- as
23 the character activity or the
subcomponents of the
24 PAHs and PCAHs produced by the patented
cigarette were
25 different. And that's why you had the
results in the
05847
1 skin painting experiments that you did.
Otherwise,
2 you could have taken -- and this might
have happened.
3 If we had vetted this process at
the FTC,
4 other companies might have come in and
shown that
5 their own cigarettes, when you experimented
this way,
6 showed the same kind of tumor reduction as
compared to
7 the surgeon general's report that ours did.
But that
8 was yet to be determined. We just knew
that something
9 was happening for reasons that we thought
were related
10 to the quality or character or activity of
these
11 particular compounds in the smoke
condensate or tar.
12 Q Kind of like flipping a light
switch, you
13 don't know what's going on in the wall,
but you flip
14 it and the light goes on? In this case
the tumors go
15 down when the catalyst is used but nobody
is quite
16 sure why? Is that what you are saying?
17 MR. WEBB: I would object to the
leading,
18 your Honor.
19 THE COURT: Sustained.
20 THE WITNESS: I was having --
21 THE COURT: Excuse me.
22 BY MR. FERGUSON:
23 Q Were you told to stop working on
the XA
24 because of scientific concerns?
25 A No.
05848

1 Q Did Joe Greer ever tell you that
Ernie
2 Pepples threatened him with regard to the
XA because
3 he was concerned about the science of the
project?
4 MR. WEBB: Objection. Leading.
5 THE COURT: Sustained.
6 BY MR. FERGUSON:
7 Q Did Joe Greer ever tell you
whether he
8 discussed the science behind the XA
project with Mr.
9 Pepples?
10 A No.
11 Q To what do you attribute the
failure of
12 Liggett to market the XA while you were
working on the
13 project?
14 MR. WEBB: Objection. Lack of
foundation.
15 THE COURT: Sustained.
16 BY MR. FERGUSON:
17 Q Over the course of the years you
were working
18 on the XA, how many meetings did you have
with people
19 regarding the XA?
20 A Really too many to quantify. A
couple of
21 hundred probably.
22 Q And that was the executives at
Liggett, the
23 general counsel of Liggett, the scientists
who worked
24 on the project?
25 A Well, these were all -- you say
meetings,
05849
1 obviously you had no meetings with all of
those people
2 involved, but you had meetings with
constituents of
3 Liggett from time to time on this
project, you know,
4 for a whole host of things over a period
of probably
5 three years. So let's just say frequent
meetings with
6 parts of those groups that you mentioned
from time to
7 time.
8 Q Mr. Webb asked you on cross-
examination if it
9 wasn't true that it was Liggett's fault
alone that the
10 Epic cigarette never went to market. Do
you agree
11 with that?
12 MR. WEBB: Object. Assumes facts
not in
13 evidence. I did not ask that question.

14 MR. FERGUSON: He did, but I
objected to it.
15 THE COURT: He did. And I think
the
16 objection was sustained.
17 MR. FERGUSON: It was. I thought
it was
18 worth a try, your Honor.
19 BY MR. FERGUSON:
20 Q What is the civil liability that
Don Cohn was
21 concerned about that he was describing at
the meetings
22 you attended?
23 A Well, the civil liability would be
claims
24 against the tobacco industry, and
specifically Liggett
25 for the marketing of a dangerous product or
the
05850
1 smoking and health issues.
2 Q Did Mr. Greer tell you whether he
discussed
3 those legal concerns with counsel for the
other
4 tobacco companies?
5 MR. WEBB: Objection. Leading.
6 THE COURT: Rephrase it.
7 BY MR. FERGUSON:
8 Q Did Mr. Greer ever tell you he
discussed the
9 legal concerns he had with anyone outside
of Liggett?
10 A Yes.
11 Q Who did he tell you he had such
discussions
12 with?
13 A Well, a number of people. But the
only name
14 that I can remember specifically is Mr.
Pepples.
15 Q So if I understand you correctly,
Mr. Pepples
16 had these discussions with Mr. Greer, and
Mr. Greer
17 never told you they discussed the science
behind XA?
18 A That's correct.
19 Q But that they discussed the legal
liability
20 situation in the industry?
21 MR. McCORMICK: Object to the
leading form.
22 THE COURT: Sustained.
23 BY MR. FERGUSON:
24 Q You were asked about the licensing
of the XA
25 product in Europe, and I believe Mr. Webb's
question
05851
1 to you was, wasn't it true that European
companies did

2 not want to license the XA because it was
not a safer

3 product? And your answer was, I believe,
no, I didn't

4 come to understand that.

5 Did you have any understanding of
why the

6 European companies were not licensing the
XA?

7 A No.

8 Q No?

9 A No.

10 Q Dr. Farone, who I think you have
heard

11 referred to, testified in this court, I
will ask you

12 to assume, with regard to Philip Morris's
13 denitrification processes. And he
characterized

14 Philip Morris's work on those projects
while he was

15 there as pyrolysis by analysis. Did you
experience

16 any similar thing while you were working
on the Epic

17 project at Liggett?

18 A No.

19 Q The project was always moving
forward?

20 MR. WEBB: Objection, leading.

21 THE COURT: Sustained.

22 BY MR. FERGUSON:

23 Q Was the project always moving
forward?

24 A In my opinion, I described it as
best I

25 could, as sort of a roller coaster. It
wasn't

05852

1 paralysis, it just wasn't heading in the
same

2 direction. Times when it was very much a
go project,

3 and times it wasn't, just as I explained,
up and down

4 over the period I was working with the
project, until

5 19-- as we now dated, late in 1979.

6 Q Do you remember Mr. Webb asking
you whether

7 it was true that epidemiological testing
was the only

8 way to prove the safety of a cigarette?

9 A Yes.

10 Q And do you agree with that?

11 A Well, I suppose in terms of
absolute

12 confidence -- I think in one of my
memorandums I

13 explained that if palladium were viewed as
a drug, and

14 under the FDA act, if you add something to
a product

15 designed for human consumption that is a
drug you
16 might very well subject that device,
product, food,
17 what have you to FDA regulation. And if
you did
18 subject this project to FDA regulation,
then the FDA
19 might say, look, before you market this
XA cigarette
20 you need to establish it is safe in
humans. I could
21 never have taken the test that we had to
the FDA.
22 Now, in my memorandum, which is in
evidence,
23 I point out that that is just a lawyer
talking, it may
24 never have happened. But the FDA, for
example, if
25 they had gotten into this project, would
assert that
05853

1 we needed to have human testing.
2 Q Is that the same kind of process
that is
3 engaged in with drug testing before it is
approved by
4 the FDA?
5 A Very similar.
6 Q Human testing is required there,
too?
7 A Yes. I mean, unless it is an
extraordinary
8 situation where you had a real need for a
drug on the
9 market before you could do in vivo, which
is human
10 testing, that would be true.
11 Q If the XA had come to market in
the United
12 States in 1980, do you know whether we
would now have
13 a sufficient basis for epidemiological
evaluation of
14 the product?
15 MR. WEBB: Objection. Lack of
foundation.
16 THE COURT: Sustained.
17 BY MR. FERGUSON:
18 Q Do you know? I would ask just
yes or no.
19 THE COURT: Last time you went
beyond yes or
20 no. Just yes or no.
21 BY MR. FERGUSON:
22 Q Just yes or no.
23 THE WITNESS: I don't want to
make a mistake,
24 would you repeat that question.
25 MR. FERGUSON: I don't think I
can.
05854

1 That's all I have, your Honor.
2 MR. WEBB: I will be extremely
short.
3 RE CROSS-EXAMINATION
4 BY MR. WEBB:
5 Q Let me try to be quick, Mr.
Meyer. Have you
6 heard the phrase you can't compare apples
to oranges,
7 you better compare apples to apples. You
have heard
8 that, haven't you?
9 A Sure.
10 Q These charts that we were just
showing to the
11 jury showed the XA cigarette to be a 7
milligram
12 cigarette. Do you agree if you are going
to try to do
13 a proper comparison of XA as a 7 milligram
cigarette
14 that you are going to have to compare it to
another 7
15 milligram cigarette in order to get a
proper
16 comparison?
17 A In terms of a real tight analysis
of the tar
18 component or the byproduct component, that
would be
19 correct.
20 Q Well, because you know that
cigarettes in
21 this country are advertised, by FTC
requirement they
22 list their tar levels, you understand
that?
23 A I do.
24 Q And the reason the FTC requires
that is
25 because of the belief that consumers learn
some
05855
1 information by seeing the tar levels
reflected in ads,
2 you understand that?
3 A Yes.
4 Q And you understand that there is
a general
5 belief that the lower the cigarette is in
tar the
6 better off it may be for you, you
understand that, do
7 you not?
8 A I understand that belief.
9 Q So if you are going to -- if --
well, this XA
10 product was developed as a 7 milligram
cigarette, and
11 if it has ever gotten to market and the ad
is going to
12 say 7 milligram, don't you think you ought
to compare

13 it to another 7 milligram cigarette
instead of a 17
14 milligram cigarette like a Marlboro?
15 A You know, I would have to say to
you that I
16 agree with your premise, that you have to
compare
17 apples to apples and oranges to oranges.
The problem
18 is if I have a cigarette on the market
that is a
19 Marlboro and is 17 milligrams, and I am
talking about
20 its potential impact on a human smoker,
and that is a
21 7 milligram product, a cigarette to
cigarette
22 comparison may still be an apple to apple
comparison
23 even though they were different, and
that's the reason
24 you get a lot of the sort of implied
benefits from
25 lower tar.
05856
1 And then of course you know the
debate about
2 whether or not people smoke lower tar
cigarettes
3 because they are not getting a sufficient
delivery of
4 what they are looking for in a cigarette.
5 So in order to be correct on
this, and I am
6 not trying to be argumentative, an apple
to apple may
7 be one XA cigarette to one Marlboro. From
a chart
8 standpoint it might be something different
than that.
9 Q Well, let's try to compare apples
to apples
10 on tar on. This chart, Exhibit 3664, if we
try to
11 compare apples to apples, just on tar, on
this chart
12 that you showed the jury -- if we called
the prototype
13 apple A, the closest thing to that, that is
a Pall
14 Mall cigarette, we will call that apple B.
Do you see
15 that?
16 A Right.
17 Q Pall Mall is actually made by your
company,
18 isn't it, Liggett?
19 A I don't think so.
20 Q Well, it doesn't matter. Let's
compare --
21 does it appear on this chart that Pall Mall
and
22 Liggett have the same amount of tar?

23 A It looks like that.

24 Q Let's see nitrogen oxide, if we
compare
25 apples to apples on the next page. On the
next page
05857

1 if we look at the -- if we look at the NO.
Do you see

2 the NO there, sir. That is a comparison of
these

3 things we have been concerned about.

4 Are you where I am?

5 A I am. I see that.

6 Q All right. I am comparing these
nitrogens of

7 oxide of the prototype. Do you see that?

8 A I do.

9 Q With the Pall Mall. Do you see
that?

10 A Yes.

11 Q If we compare those two together,
the

12 cigarette your client was inventing
or going to

13 markets had a much higher level of
NO, is that

14 correct?

15 A Compared to the --

16 Q Comparing to the Pall Mall.
If we are

17 comparing the Pall Mall here, we had a
very similar

18 degree of tar, correct?

19 A Yes.

20 Q And we compare that to the
prototype XA, the

21 XA is producing a cigarette that has a
much higher

22 level of nitrogens of oxide?

23 A That's right.

24 Q My last question, sir, is when
you just told

25 the jury that you somewhere had heard
that mouse skin
05858

1 is similar to lung tissue?

2 A In the course of the debates
twenty years

3 ago, there was a fairly large amount of
discussion

4 about the fact that the reason you used
these

5 specially bred mice with this super
sensitive skin, is

6 that is the closest that the scientists
could come

7 with replicating human lung tissue. That's
what the

8 Wynder report says. That's what the
surgeon general

9 reports says.

10 Q But you are not suggesting to
this jury that

11 either the scientific or public health
community in
12 this country have ever, ever believed
that you could
13 extrapolate data from the mouse test and
apply it to
14 humans, are you?
15 A No, I'm not.
16 Q In fact, let's look at this
document. This
17 document I showed you earlier, it is
Exhibit AS1297.
18 It is a Liggett document.
19 Do you see that, sir? Can you
see the
20 document?
21 A Yes, I do. I just have to read
it from
22 there.
23 Q I will show it to you. This is
a document I
24 showed you earlier, which is a Liggett
scientist
25 reporting on a skin painting workshop he
attended in
05859
1 1981.
2 A Right.
3 Q Let's see what he says right
here. Do you
4 see where -- this is Dietrich Hoffmann,
the famous
5 researcher?
6 A I see that.
7 Q He spoke there that day. And
he says his
8 review of tobacco studies was pretty much a
rehash of
9 previously published material. He
emphasized that
10 human information can come only from
epidemiology.
11 Do you see that?
12 A I see it.
13 Q Do you disagree with that?
14 A Do not.
15 Q And he says we never -- I
emphasize, we never
16 extrapolate from mouse skin to man.
17 Do you see that?
18 A I see that.
19 Q Do you agree with that?
20 A That is certainly what everyone in
the
21 industry, and certainly to the extent
that I was
22 involved, we always believed that to be
the case.
23 MR. WEBB: Thank you.
24 I have no more questions.
25 MR. McCORMICK: Nothing further,
your Honor.
05860

1 MR. KACZYNSKI: Nothing further,
your Honor.

2 MR. FERGUSON: Nothing further.

3 (Evening recess.)

05861

1

2 STATE OF WASHINGTON)

3 COUNTY OF KING)

4 _____)

5

6

7 We, James D. Lavielle, RPR, CSR,
Barry Fanning,

8 RPR, Official Court Reporters for the Superior
Court,

9 State of Washington, hereby certify that
the foregoing

10 comprises a full, true and correct
transcription of my

11 stenographic notes taken in the above-
entitled cause.

12

13

14 Dated this 12th day of
November, 1998.

15

16 OFFICIAL COURT
REPORTER

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19

James D. Lavielle,
RPR, CSR

20

21

Barry Fanning, RPR,
CSR

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